

1 FEDERAL TRADE COMMISSION

2 I N D E X (PUBLIC RECORD)

3

4 WITNESS: DIRECT CROSS REDIRECT RECROSS

5 Bresnahan 804 (US)

6

7 EXHIBITS FOR ID IN EVID

8 Commission

9 None

10

11 Schering

12 None

13

14 Upsher

15 Number 1002 872

16 Number 1003 837

17 Number 1004 848

18 Number 1005 858

19 Number 1006 863

20 Number 1007 869

21 Number 1008 1072 (in camera)

22 Number 1009 879

23 Number 1010 887

24 Number 1011 893

25 Number 1012 898

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1	Upsher	
2	Number 1013	901
3	Number 1014	919
4	Number 1015	928
5	Number 1016	962
6	Number 1017	1001
7	Number 1018	1003
8	Number 1019	1009
9	Number 1020	1017
10	Number 1021	1029
11	Number 1022	1040
12	Number 1023	1044
13	Number 1024	1055
14		
15	OTHER EXHIBITS REFERENCED	PAGE
16	Commission	
17	Number 18	812
18	Number 20	815
19	Number 126	804
20	Number 338	968
21	Number 348	914
22	Number 746	854
23	Number 750	804
24	Number 751	917
25	Number 1481	921

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1	Commission	
2	Number 1584	1035
3	Number 1586	885
4	Number 1592	804
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6	Schering	
7	None	
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9	Upsher	
10	Number 480	862
11	Number 498	938
12	Number 778	1006
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For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 FEDERAL TRADE COMMISSION

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3 In the Matter of:)

4 SCHERING-PLOUGH CORPORATION,)

5 a corporation,)

6 and)

7 UPSHER-SMITH LABORATORIES,) File No. D09297

8 a corporation,)

9 and)

10 AMERICAN HOME PRODUCTS,)

11 a corporation.)

12 -----)

13

14 Tuesday, January 29, 2002

15 9:30 a.m.

16 TRIAL VOLUME 5

17 PART 1

18 PUBLIC RECORD

19 BEFORE THE HONORABLE D. MICHAEL CHAPPELL

20 Administrative Law Judge

21 Federal Trade Commission

22 Pennsylvania Avenue, N.W.

23 Washington, D.C.

24

25 Reported by: Susanne Bergling, RMR

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 KAREN G. BOKAT, Attorney

5 MELVIN H. ORLANS, Attorney

6 MICHAEL B. KADES, Attorney

7 CLIFTON SMITH, Attorney

8 Federal Trade Commission

9 601 Pennsylvania Avenue, N.W.

10 Washington, D.C. 20580

11 (202) 326-2912

12

13

14 ON BEHALF OF SCHERING-PLOUGH CORPORATION:

15 JOHN W. NIELDS, Attorney

16 LAURA S. SHORES, Attorney

17 MARC G. SCHILDKRAUT, Attorney

18 Howrey, Simon, Arnold & White

19 1299 Pennsylvania Avenue, N.W.

20 Washington, D.C. 20004-2402

21 (202) 783-0800

22

23

24

25

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 ON BEHALF OF UPSHER-SMITH LABORATORIES:

2 ROBERT D. PAUL, Attorney
3 J. MARK GIDLEY, Attorney
4 CHRISTOPHER M. CURRAN, Attorney
5 White & Case, LLP
6 601 Thirteenth Street, N.W.
7 Suite 600 South
8 Washington, D.C. 20005-3805
9 (202) 626-3610

10

11 ON BEHALF OF AMERICAN HOME PRODUCTS:

12 ROBERT L. JONES, Attorney
13 Arnold & Porter
14 555 Twelfth Street, N.W.
15 Washington, D.C. 20004-1206
16 (202) 942-5667

17

18

19

20

21

22

23

24

25

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Waldorf, Maryland
(301) 870-8025

1 P R O C E E D I N G S

2 - - - -

3 JUDGE CHAPPELL: Good morning, everyone.

4 ALL COUNSEL: Good morning, Your Honor.

5 JUDGE CHAPPELL: Mr. Gidley, before you
6 proceed, is Ms. Bokat here?

7 MS. BOKAT: Good morning, Your Honor.

8 JUDGE CHAPPELL: Hi. I was looking at the
9 rules this morning regarding what you brought up, Ms.
10 Bokat, about a -- possibly an error in the -- that's
11 okay, you can remain seated -- an error -- by the
12 way, we're on the record, 9297 -- on the transcript.

13 We have a specific rule governing changes in
14 substance to the transcript, and that rule requires --
15 it says that I can order a change, and it's Commission
16 Rule 3.44(b). The reason I wanted to bring it up to
17 all the parties, it allows me to make a change based on
18 stipulations, and I have found precedent also for joint
19 motions, but what I'm getting at, rather than wait
20 until after weeks of testimony, if at night or as we're
21 going live you see something, you want to stipulate to
22 change it, we can do it on the record as long as
23 there's a stipulation.

24 I just wanted to let the parties know that my
25 intent is to follow this rule of course to the letter,

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1 but I want to make it as easy as possible on the
2 parties.

3 Does anyone have any comment on that?

4 MR. CURRAN: No, Your Honor.

5 MR. NIELDS: That sounds fine, Your Honor. We
6 will do just what the Court said.

7 JUDGE CHAPPELL: And Ms. Bokat, regarding the
8 change you mentioned, if you would offer that to the
9 other side and to the opponents, see if you can
10 stipulate as to that. I didn't have it in front of me,
11 I don't know if it's substantive, the rule covers
12 substantive changes. Whether or not it's substantive
13 is for us all to decide, I believe.

14 But I pretty much am required to -- it says
15 here I've got to allow parties notice to object before
16 I order a change, and based on what I've read, if you
17 stipulate to a change, I've got to have a good reason
18 not to accept it.

19 Just so we're clear, I asked the reporter,
20 Susanne, to change a word from a couple days ago. We
21 were talking about -- we were talking about the expert
22 using data beyond the time his expert report had been
23 done, and if you recall where we were, Mr. Kades, I
24 allowed you to have a recess so the parties could talk
25 about where you wanted to go, and I had said to you

1 that this ruling is going to involve a lot more than
2 this one objection, and Ms. -- Susanne had heard it as
3 "rule," and I informed her that I had said "ruling."

4 Does anyone object to that change?

5 MR. GIDLEY: No, Your Honor.

6 MR. NIELDS: No, Your Honor.

7 MR. CURRAN: No, Your Honor.

8 MR. KADES: No, Your Honor.

9 JUDGE CHAPPELL: With that, we will -- unless
10 there are any comments on changes to the record.

11 MS. BOKAT: So, maybe we can work out at a
12 break a potential stipulation on points I raised in the
13 transcript and then let Your Honor know.

14 JUDGE CHAPPELL: Exactly, and there's no rush.
15 I just thought if I told you how I want to apply the
16 rule -- and the rule is pretty clear in this case. We
17 don't have a lot that are real clear. This one appears
18 to be clear. Then I think as we move along, we could
19 do it that way. Otherwise, we are going to get to the
20 end of the trial, everybody's going to go through the
21 record, and before I officially close the record,
22 you're going to have a lot probably -- not a lot, but
23 you are going to have things you are going to read and
24 think, did I say that? I mean, we have all been there.
25 Whether or not it's substantive, that's another

1 issue, but if something does pop up -- Susanne is
2 doing a great job, but sometimes somebody else speaks,
3 somebody drops a book, she may not hear it exactly.

4 Off the record.

5 (Discussion off the record.)

6 JUDGE CHAPPELL: You may proceed.

7 MR. GIDLEY: Very good, Your Honor.

8 CROSS EXAMINATION (cont)

9 BY MR. GIDLEY:

10 Q. Professor Bresnahan, I'd like to show you our
11 next exhibit, and it's CX 1592, and let me tender a
12 copy.

13 Permission to approach, Your Honor?

14 JUDGE CHAPPELL: You may.

15 BY MR. GIDLEY:

16 Q. Professor Bresnahan, you've been handed
17 CX 1592, and there are three pages in this exhibit as
18 you are looking at it. Attached as CX 750,
19 Pharmaceutical Operational -- excuse me,
20 Pharmaceutical Operations Sales, 1997 to 2001, dated
21 June 5, 1997, and the third page is CX 126, 5 Year
22 Sales Plan, November 13, 1997.

23 Do you see that exhibit, sir?

24 A. I do.

25 Q. Directing your attention to the second page,

1 which is entitled Pharmaceutical Operations Sales --
2 and I believe you testified about this document on your
3 direct examination. Is that correct?

4 A. I think that's right.

5 Q. You testified about the line that's called
6 K-Dur. Isn't that correct?

7 A. Yes.

8 Q. And you observed a pattern in the future
9 projected sales as of June 1997, did you not?

10 A. Yes.

11 Q. Now, the document itself shows a projection of
12 \$190 million in 1998, \$200 million, \$173.3 million in
13 1999 and then going down in 2000 to \$113 million. Do
14 you see that?

15 A. Yes, although -- although I thought the \$190
16 million was for 1997.

17 Q. Yes, it is.

18 A. Oh, yes, okay.

19 Q. But you see that pattern, it rises and then
20 falls, and you testified about that pattern, did you
21 not?

22 A. I did.

23 Q. Now, this document on its face doesn't recite
24 the assumptions in the forecast, does it, sir?

25 A. No, it does not.

1 Q. And if I direct your attention to Lotrisone, L
2 O T R I S O N E, two drugs below, it's a similar
3 pattern. It's \$110 million in 1997, is it not?

4 A. Let me find it. It is \$110 million in 1997,
5 latest estimates, yes.

6 Q. And again, this is a forecast. \$116 million in
7 1998, is it not?

8 A. Yes.

9 Q. \$122 million in 1999?

10 A. Yes.

11 Q. And then falling in the year 2000 to \$93.2
12 million, correct?

13 A. Yes.

14 Q. Looking at the face of this document, can you
15 tell whether that's due to the entry of a generic or a
16 change in marketing strategy and detailing or some
17 other factor?

18 A. No, looking at the face of this document, you
19 can't determine the cause of that.

20 Q. And similarly, for the K-Dur line, on the face
21 of this document alone, you can't tell whether it's a
22 change in marketing strategy that's being forecast or
23 the entry of a generic. Isn't that correct?

24 A. That's -- or -- that's correct, not on the
25 face of this document.

1 Q. Let me direct your attention to the first page
2 of this three-page exhibit, CX 1592 itself. That's a
3 demonstrative. Do you see that?

4 A. Yes.

5 Q. And I believe you testified about this graph on
6 your direct, did you not?

7 A. Yes, I believe I did.

8 Q. And this chart combines the sales of K-Dur 10
9 and K-Dur 20, does it not?

10 A. Yes, it does.

11 Q. So, you have two different products with two
12 different product markets on the same data, do you not,
13 by your own analysis of the product market, do you not?

14 A. Yes, in the same data.

15 Q. All right. So, when we see the dots on this
16 chart, each one of those dots combines the sales of
17 K-Dur 10 and K-Dur 20, does it not?

18 A. Yes, I believe it does.

19 Q. Let me direct your attention to the backup on
20 the third page, which is CX 126, a five-year sales
21 plan apparently dated November 13, 1997. Are you on
22 that page?

23 A. Yes.

24 Q. And at the very top it says, "5 Year Sales
25 Plan," correct?

1 A. Yes.

2 Q. Now, directing your attention to the K-Dur
3 product description group, do you see that?

4 A. Yes.

5 Q. Do you see the portion of the document that is
6 part of the K-Dur product family? Do you see that?

7 A. Yes.

8 Q. Now, this has a sales forecast with some of the
9 numbers that you used. 1997, \$185 million, correct?

10 A. I can't quite read it in this copy, but I think
11 that's right.

12 Q. All right. Let me direct your attention to the
13 left-hand column, as I want to understand exactly
14 what's in the total forecast. The first line reads,
15 "K-Dur TBS 10 mEq 100 U/D."

16 Do you see that?

17 A. Yes.

18 Q. And sir, would you explain to the Court what
19 that is?

20 A. That's a packaging for 10 milliequivalent K-Dur
21 tablets.

22 Q. And what does the abbreviation or the symbol
23 "U/D" stand for?

24 A. I don't recall what it stands for.

25 Q. All right. It stands for unit dose, does it

1 not?

2 A. It might, yes.

3 Q. All right. The next line, "K-Dur tabs, 10 mEq,
4 100/bottle," correct? That's a bottle of 100 tablets?

5 A. I believe that's right.

6 Q. The next line, "K-Dur tabs, 20 mEq, 100/HD
7 free goods," what is that?

8 A. The -- I suspect that that is -- but I'm not
9 sure -- that those are samples and the like.

10 Q. Okay, and that's because it says, "free gds"?

11 A. Yes.

12 Q. You're reading that as free goods?

13 A. Yes.

14 Q. And sir, do you have any idea where these free
15 goods would be distributed?

16 A. Typically to physicians by detail men.

17 Q. Would it surprise you that my understanding is
18 that this is actually distributed at the hospitals in
19 blister packs, both so they can divide it up by
20 patients and also so they can create brand awareness,
21 so once they leave the hospital, they can become
22 regular prescribers and customers of the K-Dur 20 drug?
23 Do you have a contrary understanding?

24 A. No, but I didn't fully understand yours. The
25 -- I thought you said they were distributed to

1 patients?

2 Q. Distributed in the hospital in the blister
3 packs, which can be individually separated, can they
4 not?

5 A. Blister packs can, yes.

6 Q. All right. Now, that free goods sampling is
7 quite significant, is it not, in this projection?

8 A. You mean the volume of activity here?

9 Q. Yes, sir.

10 A. Yes. There's a -- there's a considerable
11 amount of product there.

12 Q. Sir, you haven't studied the quantitative
13 relationship between K-Dur 10 sales and K-Dur 20 sales,
14 have you?

15 A. Not in this context, no.

16 Q. Well, not in this case at all. Isn't that
17 correct?

18 A. Not in a comparative way, but sometimes I study
19 the sum, as here, and sometimes only the 20.

20 Q. Sir, you haven't done a quantitative study that
21 would quantify, for instance, the cross-elasticity
22 between K-Dur 10 and K-Dur 20, have you,
23 sir?

24 A. No, that I have not.

25 Q. And similarly, you haven't studied long-term

1 pricing trends of K-Dur 10 and K-Dur 20 to determine
2 what effect, if any, one product has on the other
3 product's price, have you, sir?

4 A. No, I have not.

5 Q. Do you contend that Klor Con 10 is a monopoly
6 product?

7 A. No, I don't have any opinion on that.

8 Q. You haven't studied that question?

9 A. I have not.

10 Q. Do you know what Klor Con 10 -- strike that.
11 As you sit here today, do you know what
12 products Klor Con 10 competes with?

13 A. The -- in a general sense, I presume -- I
14 analyzed it as competing with other 10 milliequivalent
15 formulations, but I haven't formed an opinion about
16 whether that's a market or how strong that competition
17 is.

18 Q. And as you sit here today, have you
19 quantitatively analyzed the relationship between Klor
20 Con 10 sales and K-Dur 20 sales, sir?

21 A. Only in the context of my analysis of the K-Dur
22 20 in general in which one of the -- one of the other
23 products is Klor Con M10.

24 Q. But you haven't studied, for instance, monthly
25 or yearly sales of Klor Con 10 and determined through

1 any kind of rigorous econometric approach whether they
2 are affected by rises or falls in the price of K-Dur
3 20, have you?

4 A. No, I have not done any -- I have not done any
5 econometric analysis in this matter.

6 Q. Could I direct your attention back to the blue
7 book of cross examination exhibits that we discussed
8 yesterday?

9 A. Yes.

10 Q. Specifically, let me direct your attention to
11 tab 3.

12 A. Let me get it. Yes, I'm back in tab 3.

13 Q. Now, tab 3 is the 1997 K-Dur marketing plan, CX
14 18, is it not?

15 A. Yes.

16 Q. Just to have a context for the next series of
17 questions, I just want to review where Schering thought
18 the K-Dur market was as of September 10, 1996, which is
19 contained in this marketing plan, is it not?

20 A. Yes, this -- the -- this is their marketing
21 plan for that year. I'm sorry, I mean as of that time.

22 Q. And to review from yesterday, at the bottom of
23 the first paragraph, Schering was considering making a
24 strong effort to grab share from generics. Isn't that
25 correct? This is page 3, the first paragraph, the last

1 line.

2 A. I'm sorry, which -- I'm looking -- oh, the
3 bottom of the first paragraph. Yes.

4 Q. Similarly, Schering had observed in its K-Dur
5 marketing plan that generic competition continues to
6 grow at the expense of K-Dur 20, had they not?

7 A. They had.

8 Q. And they stated as one of their objectives in
9 this marketing plan, the last sentence, this is the
10 third paragraph, "Our strategy to blunt the continued
11 growth of generic potassium usage will reverse this
12 trend."

13 Do you see that?

14 A. I do.

15 Q. And that's a quote you used in the end notes of
16 your report, is it not?

17 A. I think so, yes.

18 Q. And just so we recall in the context of August
19 of 1996 on page 4, Roman numeral II, Vision, K-Dur was
20 the first product in potassium to reach over \$100
21 million in sales. Isn't that correct?

22 A. Yes, that's what it says.

23 Q. And Schering had a vision for K-Dur to double
24 sales to over \$200 million in this document, did it
25 not?

1 A. Yes.

2 Q. And turning your attention to the pie chart on
3 page 5, expressed in TRX, total prescriptions, K-Dur
4 had 37 percent market share according to the K-Dur
5 marketing plan in 1997, correct?

6 A. Yes --

7 MR. KADES: Objection, Your Honor. This was
8 asked and answered, and we gave counsel an opportunity
9 to set the context, but he's essentially now just going
10 through everything he did yesterday.

11 MR. GIDLEY: Your Honor, each of these
12 questions will have an analogous page in the next
13 marketing plan, and I think both to orient the witness
14 and to make the examination sensible, we want to start
15 in '96 and then proceed to a new document, which is the
16 1998 marketing plan, and that's my next question.

17 JUDGE CHAPPELL: Well, do you need to repeat a
18 question you've already asked if he's not confused?

19 MR. GIDLEY: I am going to compare this pie
20 chart with the next pie chart, yes, Your Honor.

21 JUDGE CHAPPELL: I will allow it, but don't
22 overdo it, Mr. Gidley. So, the objection is overruled
23 at this time.

24 BY MR. GIDLEY:

25 Q. Directing your attention, Professor Bresnahan,

1 to tab 7, the 1998 K-Dur marketing plan.

2 A. Yes.

3 Q. That's CX 20, is it not?

4 A. Yes.

5 Q. And by the way, this document is the K-Dur
6 marketing plan, and it's dated as of August 1st, 1997,
7 is it not?

8 A. Yes, that's right.

9 Q. On page 3, under Executive Summary, as of
10 August 1997, the vision for K-Dur was to become the
11 first \$300 million potassium replacement product in
12 history, was it not?

13 A. Yes, that's what it says.

14 Q. And by the way, at this point in time, we are
15 approximately one to two months after the signing of
16 the June 17, 1997 agreement between Schering-Plough and
17 Upsher-Smith, are we not?

18 A. Yes, that's right, about -- yeah, a little
19 over two months later.

20 Q. About 45 days or so, correct?

21 A. Well, is that right?

22 Q. June 17 to August 1st.

23 A. Well, this --

24 Q. That's about 45 days, isn't it, 43 days later?

25 A. That's right, thank you.

1 JUDGE CHAPPELL: Gentlemen, one at a time,
2 please.

3 Susanne, did you get all that?

4 THE REPORTER: Yes, I think so.

5 BY MR. GIDLEY:

6 Q. Under Roman II, Vision -- strike that.

7 Going down to the next section, Roman numeral
8 III-A, Sales, the 1998 marketing plan for K-Dur says,
9 "In 1996, the major products driving this increase in
10 the Potassium Chloride Market were K-DUR (10 and 20 mEq
11 tablets), the generic KCl's, and Klor Con (8 and 10 mEq
12 tablets)."

13 Do you see that?

14 A. Yes.

15 Q. And for purposes of the K-Dur marketing plan,
16 the Schering executives have combined the discussion
17 here of 10 and 20 mEq tablets, have they not?

18 A. They have.

19 Q. And in the same sentence, they talk about
20 generic potassium chloride, do they not?

21 A. They do.

22 Q. And in the same sentence, they talk about
23 branded Upsher-Smith Klor Con 8 and 10 mEq in the same
24 sentence with K-Dur 20 mEq, do they not?

25 A. They do.

1 Q. Directing your attention to the pie chart at
2 the bottom of page 5 -- and this is document Bates
3 numbered, by the way, SP 004034 -- the market share
4 for K-Dur is now 38 percent according to this document,
5 is it not?

6 A. Yes, that's what it shows in the pie chart.

7 Q. And it's risen from 37 percent in the last
8 document, has it not?

9 A. Yes, that's what I recall.

10 Q. And Klor Con was at 12 percent in the last pie
11 chart, the 1997 K-Dur marketing plan, was it not?

12 A. Yes, I believe that's right.

13 Q. Well, let's make sure. Why don't you flip back
14 and double-check that pie chart.

15 A. Yes, was that tab 3?

16 Q. Yes, it was.

17 A. Thank you.

18 Q. And you are looking now at page 5 of SP
19 2300041, which is the 1997 marketing plan, are you not?

20 A. I am. I'm looking at page 5, the one whose SP
21 number is 41, and which is Klor Con 10, whereas the one
22 on the other page 5, the one that -- whose SP number
23 ends 34, is -- is Klor Con, and I take it to be both 8
24 and 10 from the prose in the paragraph.

25 Q. But you haven't done an analysis one way or the

1 other of the 1998 document as to whether the 8 and 10s
2 are both combined in that 16 percent market share for
3 Upsher-Smith's Klor Con product, have you?

4 A. No.

5 Q. Generic has held steady at approximately 30
6 percent between 1996 and 1997, has it not?

7 A. Yes, that's right.

8 Q. And as of August 1, 1997, Schering in this
9 document was showing that a majority of the potassium
10 prescriptions were not accounted for by K-Dur. Isn't
11 that correct?

12 A. I'm sorry, I lost the beginning of the
13 question.

14 MR. GIDLEY: Could we have that back?

15 (The record was read as follows:)

16 "QUESTION: And as of August 1, 1997, Schering
17 in this document was showing that a majority of the
18 potassium prescriptions were not accounted for by
19 K-Dur. Isn't that correct?"

20 THE WITNESS: Yes, that's correct.

21 BY MR. GIDLEY:

22 Q. Specifically, 62 percent of TRX, total
23 prescriptions, of potassium were not accounted for by
24 K-Dur products. Isn't that correct?

25 A. That's correct in this chart.

1 Q. And in this chart, the K-Dur products combine
2 for the 38 percent, the 10 and the 20 mEq tablets, do
3 they not?

4 A. I believe so.

5 Q. Directing your attention to the top of page 6,
6 the August 1997 Schering K-Dur plan reads, "Total
7 dollars and both new and total prescriptions are
8 continuing an upward trend in this very established
9 market. K-DUR has had significant increases, up 8% in
10 NRxs and 9% in TRxs for April YTD," year to date, "1997
11 as compared to April YTD 1996."

12 Do you see that?

13 A. I do.

14 Q. Now, that sentence, when you read this
15 document, does that not tell you that K-Dur has been
16 able to increase the total number of K-Dur
17 prescriptions 1997 over 1996? Is that not correct?

18 A. Yes, that's what it says.

19 Q. And doesn't that mean that Schering-Plough in
20 the sale of its K-Dur product had been expanding the
21 output of its sale of the K-Dur product between 1997
22 and 1996?

23 A. Had been expanding its -- its sales, yes.

24 Q. Well, and specifically they had been increasing
25 the quantities of K-Dur that had been sold, had they

1 not?

2 A. Yes, they had.

3 Q. Now, isn't that inconsistent with what a
4 monopolist does?

5 A. No.

6 Q. Isn't a textbook definition of monopoly that a
7 monopolist will lower prices -- will raise prices and
8 lower quantities produced?

9 A. Yes, relative to the -- a more competitive
10 situation, but not necessarily over time.

11 Q. All right, but over this 12-month period, does
12 this indicate that Schering-Plough was behaving as a
13 monopolist in your view?

14 A. It neither indicates it nor contradicts it in
15 any way.

16 Q. Well, doesn't it suggest that they were
17 actually expanding the output in terms of units
18 produced of K-Dur tablets?

19 A. Yes, they were expanding the output over time.

20 Q. And isn't it not the case that the textbook
21 definition of monopoly is, in fact, reducing the
22 quantity produced?

23 A. Yes, though that has no relevance to these
24 numbers.

25 Q. And why is that?

1 A. A monopolist reduces output relative to what
2 would happen if there were competition. That doesn't
3 necessarily mean that they will either increase or
4 decrease output over time.

5 Q. Now, sir, nowhere in your report do you
6 demonstrate that Schering-Plough has ever reduced the
7 quantity produced of K-Dur products. Isn't that
8 correct?

9 A. I don't think that's correct.

10 Q. Where do you demonstrate that Schering-Plough
11 reduced the quantity produced of K-Dur? Where do you
12 demonstrate that in your report, sir?

13 A. Relative to the competitive situation, the --
14 when I examined the -- those forecasts or projections,
15 if you will, that compare the then current market to
16 the market with generic entry, the market with generic
17 entry in some of the forecasts had larger quantities.

18 Q. I'm not talking about the scenarios of generic
19 entry. I'm talking about before generic entry in the
20 1995 to 1997 period. Does your report discuss at all
21 or demonstrate -- provide any evidence that
22 Schering-Plough was reducing the quantity produced of
23 K-Dur? Yes or no.

24 A. No.

25 Q. I'm sorry?

1 A. I'm sorry, I said no.

2 Q. That's not in your report?

3 A. No, only in -- only in the sense I just said.

4 Q. All right. And the only thing that's discussed
5 in your report, so that the record is clear, the only
6 thing discussed in your report is projections of the
7 impact of generic entry. Isn't that correct?

8 A. Right, those are the only thing that, as I
9 recall, quantitatively compare competitive quantities
10 to branded quantities.

11 Q. But isn't it the case that between 1996 and
12 1997, the period that we're talking about
13 contemporaneous with the June 1997 agreement, the truth
14 is that Schering-Plough was expanding its sales of the
15 K-Dur product? Isn't that correct?

16 A. Yes, it was expanding its sales between two
17 monopoly periods.

18 Q. But it was expanding output between 1996 and
19 1997. Isn't that correct?

20 A. That's correct. That fact is correct.

21 Q. Turning to the next sentence of your -- of
22 this document -- excuse me, strike that.

23 Directing your attention to the top of page 6
24 of the 1998 K-Dur marketing plan, it says, "Klor Con,"
25 which is the Upsher-Smith product, "experiencing the

1 greatest percent change increases from the same time
2 last year, up 12% in new and 11% in total
3 prescriptions."

4 Do you see that?

5 A. I do.

6 Q. And did you read this when you were reviewing
7 your documents in connection with this case?

8 A. Yes.

9 Q. And doesn't this indicate that in terms of TRX,
10 that is, total prescriptions of potassium, that Klor
11 Con was growing in its market share --

12 A. Yes.

13 Q. -- in this period?

14 A. I'm sorry.

15 Q. I'm sorry.

16 A. I thought you were finished.

17 Yes, it does.

18 Q. So, in the time period of August of 1997 versus
19 the earlier period of 1996, Upsher-Smith was increasing
20 its sales of potassium chloride products, was it not?

21 A. Yes, that's correct.

22 Q. In fact, Upsher-Smith's Klor Con line had
23 experienced the greatest percentage change increase in
24 this time period, had it not?

25 A. Yes, that's correct.

1 Q. And in the period between 1997 and 1996, wasn't
2 it the case that generic potassium chloride was also
3 growing?

4 A. Yes, that's also correct.

5 Q. And indeed, the K-Dur marketing plan notes,
6 "Generic potassium chloride, KCl, is growing at a
7 slower rate, up 3% in NRxs and 6% in TRxs."

8 Do you see that?

9 A. I do.

10 Q. And do you have any reason to dispute that?

11 A. No, I do not.

12 Q. Now, during this time period, 1996 and 1997,
13 wasn't it the case that K-Dur was priced more than the
14 generic potassium chloride?

15 A. Yes, that's correct.

16 Q. And one of the results of that price difference
17 was that generic sales were growing as well as the
18 sales of other branded potassium chloride products,
19 were they not?

20 A. Yes, I believe that that was one of the causes.

21 Q. Now, going back to page 5, the pie chart, what
22 is in the slice of the market that is represented by 16
23 percent "other" of the TRX market share? What's in
24 "other," sir?

25 A. All other potassium chloride supplements, as I

1 understand it.

2 Q. And since it's not in generic, would you
3 conclude that those are branded competitors?

4 A. Yes, I would -- I would expect them to be
5 branded.

6 Q. Directing your attention to the next page, page
7 6 again, the middle paragraph, the yellow highlighted
8 sentence, this is from the 1998 K-Dur marketing plan
9 dated August 1, 1997.

10 "As evidenced in the following graphs, our
11 major competitors, Klor-Con and generic KCL," do you
12 see that?

13 A. Yes, I do.

14 Q. Now, in this sentence, Schering-Plough is
15 stating that the major competitors of K-Dur are Klor
16 Con and generic potassium chloride, are they not?

17 A. Yes, that's what that says.

18 Q. And it says that these major competitors "have
19 similar trends with Klor-Con capturing more
20 prescriptions from the IMs and generic KCL capturing
21 more Rx's from the primary care physicians."

22 Do you see that?

23 A. I do.

24 Q. What does IM stand for?

25 A. I don't recall at this moment.

1 Q. Do you have any idea what IM stands for?

2 A. No, I don't recall.

3 Q. Turning the page to page 7, on August 1st of
4 1997, Schering-Plough was considering at the bottom of
5 the page a K-Dur lozenge. Do you see that?

6 A. I do.

7 Q. And is such innovation consistent with Schering
8 being a monopolist for K-Dur 20 products?

9 A. Yes.

10 Q. Why is that?

11 A. A -- a monopolist may introduce -- may
12 introduce new products, possibly to extend its brand
13 over time or otherwise. There is to my knowledge
14 nothing in the economics of monopoly which says
15 monopolists do not innovate.

16 Q. The introduction of new products by itself, as
17 such, is not anti-competitive, is it?

18 A. Is not -- I missed the last word. I'm sorry.

19 (The record was read as follows:)

20 "QUESTION: The introduction of new products by
21 itself, as such, is not anti-competitive, is it?"

22 THE WITNESS: No, not necessarily.

23 BY MR. GIDLEY:

24 Q. I direct your attention to page 8 of the August
25 1, 1997 K-Dur marketing plan. The yellow highlighted

1 sentence reads, "By major competitor, the following
2 graphs."

3 Do you see that language?

4 A. Yes.

5 Q. And there are three pie charts on page 8, are
6 there not?

7 A. Yes.

8 Q. And the three major competitor groups in this
9 page are Klor Con, generic potassium chloride, as well
10 as a pie chart for K-Dur, are they not?

11 A. Yes.

12 Q. And those are the major competitors of K-Dur 20
13 as of August 1, 1997, are they not?

14 A. According to -- according to this analysis,
15 yes.

16 Q. All right. Well, according to Schering's
17 analysis in this time period, the major competitors for
18 K-Dur 20 were generic potassium chloride and Klor Con.
19 Isn't that correct?

20 A. That's right. I'm sorry, I said that's right.

21 Q. Directing your attention to page 3 --

22 A. Ah --

23 Q. Excuse me, page 10, page 10, Bates number 4039,
24 the Schering K-Dur market plan reads, "Trade Sales --"
25 I'm at the bottom of the page " -- provides K-DUR with

1 opportunities to capture the \$70 million in sales lost
2 to non-compliance."

3 Do you see that?

4 A. Yes.

5 Q. So, in August of 1997, there were further
6 opportunities for Schering to grow market share by
7 reducing patient noncompliance. Isn't that correct?

8 A. Yes. The -- if they achieve -- recover these
9 sales lost to noncompliance by any means, as a
10 mechanical matter they're -- and no one else does
11 that, as a mechanical matter, their market share as
12 reported here will rise.

13 Q. And sir, \$70 million is a large market
14 opportunity relative to the total sales of K-Dur 10 and
15 20, is it not?

16 A. Yes, it's substantial.

17 Q. Directing your attention to the next page, page
18 11, Bates numbered 4040, of the 1998 K-Dur marketing
19 plan, Schering-Plough lists two challenges. The first
20 is, "Low patient compliance/persistency."

21 Do you see that?

22 A. I do.

23 Q. So, as of August 1, 1997, Schering in marketing
24 K-Dur was still having troubles with patient compliance
25 for potassium, was it not?

1 A. Yes, that's what -- that's how I interpret
2 this.

3 Q. And they were having that problem for their
4 K-Dur 20 product as well as the K-Dur 10 product, were
5 they not?

6 A. Yes.

7 Q. Directing your attention to the second
8 paragraph on page 11 of the document dated August 1,
9 1997, "Generic competition continues to grow at the
10 expense of K-DUR 20."

11 Do you see that?

12 A. I do.

13 Q. And doesn't it suggest that Schering believed
14 on August 1 of 1997 that they were losing sales, sales
15 opportunities, to generic potassium chloride, were they
16 not?

17 A. Yes, it suggests they were losing some sales.
18 I don't know about sales opportunities, but some sales.

19 Q. Well, they were losing sales that they might
20 otherwise have gotten for their own product, K-Dur 20,
21 were they not?

22 A. Yes, that's how I understand it.

23 Q. Now, the next sentence will clarify the point
24 that you and I discussed a few minutes ago. "Klor-Con
25 10, a branded generic, has grown to 16% of total

1 prescriptions."

2 Do you see that?

3 A. I do.

4 Q. And you will recall that in the prior document,
5 Klor Con 10 was at 12 percent, was it not?

6 A. Yes, it was.

7 Q. And so now Klor Con 10, from 1996 to 1997, has
8 grown in TRX, total prescriptions of potassium
9 chloride, from 12 percent of total U.S. prescriptions
10 to 16 percent of total U.S. prescriptions in this time
11 period, have they not?

12 A. Yes, I believe that's what it means.

13 Q. Now, what is a branded generic?

14 A. A branded generic is a generic drug which
15 enjoys some benefits of having a brand name as well.
16 The -- some generic entrants attempt to differentiate
17 their product from the -- from other generics by
18 branding strategies.

19 Q. And in your report, your August 15, 199 --
20 2001 report, does the concept of branded generic in
21 relation to Upsher-Smith appear?

22 A. I don't think so.

23 Q. Now, a branded generic would be a generic that
24 would have a brand image and for which the manufacturer
25 might be trying to promote a brand. Is that not

1 correct?

2 A. Yes, that's what I believe it means.

3 Q. Now, at the time period that Klor Con 10 was
4 growing from 12 percent market share to 16 percent
5 market share, wasn't it the case that there was a price
6 differential between K-Dur 20 and generic potassium
7 chloride?

8 A. Yes, I believe that's right.

9 Q. In fact, that's contained in the same
10 paragraph, is it not, sir?

11 A. Let me look. Yes.

12 Q. And that's the sentence that reads, "The growth
13 in the generic market is due in part to the 30% price
14 advantage over K-DUR 20, but managed care also plays a
15 significant role."

16 Do you see that?

17 A. I do.

18 Q. Now, directing your attention to the growth
19 from 12 percent TRX to 16 percent of TRX in 1997, isn't
20 that a 33 percent increase in market share points for
21 Upsher's Klor Con 10 product in this time period?

22 A. Yes, that's right.

23 Q. Now, you will recall when we earlier this
24 morning were looking at the 1997 K-Dur plan, which is
25 actually dated 1996, that Schering had a bold strategy

1 to capture market share, but despite that, sir, wasn't
2 it the case that generics one year later had grown a
3 full percentage point?

4 A. Yes, that's correct.

5 Q. In fact, the 199 -- the August 1, 1997
6 Schering-Plough document reads, "The category of
7 generics has grown over a full point to 30% of total
8 prescriptions."

9 Do you see that?

10 A. I do.

11 Q. And do you have any reason to believe that the
12 generics had not grown a full point in TRX of potassium
13 chloride in this time period?

14 A. No, I do not.

15 Q. In fact, the source for this data is TRX data
16 from IMS. Isn't that correct?

17 A. I believe that's right.

18 Q. And you rely on IMS data yourself, do you not,
19 sir?

20 A. I do.

21 Q. Directing your attention to the sentence that
22 begins, "Usage data for 10 mEq generics shows that most
23 patients are using 2 tablets a day, a dose equivalent
24 to one K-DUR 20."

25 Do you see that quote?

1 A. I do.

2 Q. Now, sir, doesn't this indicate that at
3 Schering, in August of 1997, they had noted that the 10
4 mEqs were being used as two tablets a day in an
5 equivalent dose to the K-Dur 20?

6 A. Yes, that's what it says.

7 Q. Does this sentence appear in your report or in
8 your end notes, sir?

9 A. I don't believe so.

10 Q. Why not?

11 A. The -- there is a -- there are equivalent
12 material in my report, I believe, where it says that a
13 typical dose -- in fact, I know -- I don't recall
14 with precision what my report says, but it's my
15 understanding that the most common dose is 20 and that,
16 therefore, I would expect a patient who was getting --
17 who was getting 10 milliequivalent pills would be dosed
18 at two a day.

19 Q. Sir, isn't it the case that you define a 20 mEq
20 only -- tablet only product market in the 1997 time
21 period where the only product that competes is K-Dur
22 20? Is that not correct?

23 A. That's correct.

24 Q. And sir, in your report, one of the reasons why
25 you draw that product market a price difference between

1 K-Dur 20 and generic potassium chloride, do you not?

2 A. Yes.

3 Q. And sir, in your report, is the only evidence
4 of a price differential between K-Dur 20 and potassium
5 chloride this 30 percent quote which appears on page 11
6 of this document? Isn't that the only specific price
7 reference in your report or your footnotes, your end
8 notes?

9 A. I don't know whether that's the only specific
10 reference in my report or my end notes. I mean, there
11 are other places in these documents that point to a
12 price difference.

13 Q. All right, we will see that in a second.

14 Let me ask you this: Do you have a complete
15 pricing data set for K-Dur 20 from 1995 through 2001?

16 A. I do not.

17 Q. And do you have, sir, a complete pricing data
18 set for K-Dur 10 from 1995 through 2001?

19 A. I do not.

20 Q. Do you have a complete pricing data set for
21 Klor Con 10 from 1995 to 2001?

22 A. No.

23 Q. Do you have a complete pricing data set for
24 Klor Con 8 from 1995 to 2001?

25 A. No.

1 Q. Now, there are a variety of other smaller
2 branded generic potassium chlorides. Do you have a
3 time series pricing data set for any of those potassium
4 chloride products between 1995 and 2001, sir?

5 A. No, I do not.

6 Q. Directing your attention to page 12 of the
7 document dated August 1, 1997, Schering's K-Dur 20
8 marketing plan, the second issue that the Schering
9 executives were looking at apparently, as I read this
10 document, was, "Key Issues/Strategies," then issue 2,
11 "Continued low compliance and persistence."

12 Isn't that correct?

13 A. Yes, that's what it says.

14 Q. And indeed, they were noting that there is
15 still low patient compliance in the long term with
16 taking K-Dur 20. Isn't that correct?

17 A. I presume you mean over the 12-month period is
18 the long term?

19 Q. Right, and after 12 months of patients taking
20 that in my view largest tablet, how many patients were
21 still taking potassium chloride at the end of 12 months
22 according to this document at this time?

23 A. As I read it, after 12 months, after a year, 22
24 percent of the patients are still taking it.

25 Q. What is the average age -- strike that.

1 Did we ask yesterday --

2 JUDGE CHAPPELL: Mr. Gidley, do you realize you
3 keep saying "strike that," and the court reporter is
4 not striking anything. Do you know that?

5 MR. GIDLEY: Yes, I understand. I'm just --
6 it's a shorthand for going on to my next question.

7 BY MR. GIDLEY:

8 Q. Do you know the average age of the patients
9 taking K-Dur 20 at this time period?

10 A. No, I don't.

11 Q. Would it surprise you to learn that many of
12 them may be over 60?

13 A. That would not surprise me.

14 Q. I would now like to direct your attention to
15 two exhibits which are based on your end notes for your
16 report, and I'm going to be addressing a product market
17 section of your report and two of the end notes, end
18 notes D and F, and let's start with end note D.

19 Professor Bresnahan, I will be asking you
20 questions about page 25 of your report.

21 A. Should I also bring up the end note?

22 Q. Yes. And for your convenience and the Court's
23 convenience, we've retyped the text with the supporting
24 end note, and I'm happy for you to refer either to our
25 retyping, which I will certify to you we have made

1 every effort to make it accurate, or you can just
2 simply review it from your report.

3 Your Honor, may I approach?

4 JUDGE CHAPPELL: Yes.

5 MR. GIDLEY: Your Honor, we have not marked
6 this as an exhibit, but it might be better for our
7 record to go ahead and mark this as a USX exhibit
8 simply so we have a clear record. I don't care whether
9 the witness works from the retyping of the text and the
10 end note or whether he works directly from his report.
11 They are identical.

12 JUDGE CHAPPELL: It's up to you. If you want
13 to mark it, just --

14 MR. GIDLEY: Why don't we go ahead and mark it,
15 Your Honor.

16 JUDGE CHAPPELL: -- give her the number.

17 (Discussion off the record.)

18 (USX Exhibit Number 1003 was marked for
19 identification.)

20 MR. GIDLEY: We have handed Professor Bresnahan
21 USX Exhibit 1003, which is a verbatim retyping of the
22 text of the Bresnahan report and the accompanying end
23 note D, and this comes from Bresnahan report at 25 and
24 then the corresponding page at the end note, and the
25 reason for retyping it is so that we have on a single

1 page the text and the supporting end note.

2 BY MR. GIDLEY:

3 Q. Now, Professor Bresnahan, I just want to hit on
4 a few of these quotes that you have in the end note.
5 Is this an end note, sir, that you yourself wrote?

6 A. I believe I wrote most of this.

7 Q. Let me direct your attention to the end note
8 that begins, "Competition from 10 mEq and smaller
9 formulations is limited," and this supports text which
10 reads, "Competition from generics for other kinds of
11 potassium supplements, such as 8 and 10 mEq products,
12 has not had the same kind of impact on Schering's
13 profits position as anticipated from the entry of K-Dur
14 20 generics."

15 JUDGE CHAPPELL: Excuse me, Mr. Gidley, excuse
16 me. Sir, did you tell the Counselor that you believe
17 you wrote this?

18 THE WITNESS: Yes.

19 JUDGE CHAPPELL: I believe before we spend a
20 lot of time questioning the witness about this, can you
21 give him time to verify whether or not this is a copy
22 of his work?

23 MR. GIDLEY: Yes, please familiarize yourself
24 with USX 1003.

25 THE WITNESS: Actually, Mr. Gidley, the part

1 you read just -- just hit me funny. Yes, there's an
2 extra word.

3 BY MR. GIDLEY:

4 Q. Which word is that, sir?

5 A. "Profits."

6 Q. Let's delete it.

7 A. Okay.

8 Q. Do you have a pen? Why don't you just put a
9 strike-out through it.

10 A. I don't have a pen.

11 Q. I have one, Professor.

12 JUDGE CHAPPELL: Let me give you a pen.

13 BY MR. GIDLEY:

14 Q. In the third line -- are you there?

15 A. Yes.

16 Q. Have you had a chance to fully familiarize
17 yourself with this exhibit?

18 A. Well, I haven't -- I haven't read the end note
19 and compared it --

20 Q. Why don't you read the whole thing.

21 A. -- but let me read it. (Document review.)

22 Mr. Gidley, I have now read it. I haven't
23 checked all the numbers and all, the SP -- those kind
24 of numbers, but I've now read it over.

25 Q. Directing your attention to the second document

1 you reference, SP 2300378, which is contained as part
2 of a larger document, that's our tab 2 from the blue
3 exhibit book. So, can you turn to --

4 A. I've lost you. Should I open tab 2?

5 Q. Yes, and I direct your attention to page 378 at
6 tab 2.

7 A. Oh, page 378. Yes.

8 Q. The end note reads, "SP 23 00378 notes that one
9 of K-Dur's two disadvantages is that it is 'more
10 expensive than other potassium supplements' without
11 this difference leading to a shift, a fact confirmed by
12 examining the appendices to that Backgrounder."

13 Do you see that?

14 A. No, I'm sorry, where are you?

15 Q. I'm reading your end note.

16 A. But where?

17 Q. I'm reading it in lines 3 through 6 underneath
18 D, Competition.

19 A. Oh, I see, yes. Okay.

20 Q. Now, your report doesn't mention that some
21 patients were experiencing stomach irritation, does it?

22 A. No.

23 Q. And it doesn't mention that some patients were
24 finding the K-Dur product difficult to swallow, does
25 it?

1 A. I don't think so.

2 Q. Now, this document doesn't quantify the cost
3 differential, does it? "This document" being a
4 reference to the 1996 backgrounder at page 378.

5 A. You mean -- you mean -- I'm sorry, I'm
6 looking at two documents, the -- and you pointed me to
7 both of them. My report or the page 378?

8 Q. Page 378, the underlying document that you're
9 citing.

10 A. No.

11 Q. Now, the point you conclude at the end of this
12 sentence of the end note is that the price
13 differential, this difference -- "without this
14 difference leading to a shift."

15 Do you see that phrase of your end note?

16 A. Yes.

17 Q. Now, isn't it the case, sir, that the price
18 differential between K-Dur 20 and other products was
19 leading to a shift in this time period, and that's
20 exactly found at Appendix A-5 -- excuse me, A-3 of the
21 1996 backgrounder, is it not?

22 A. Let me look. There's a difference -- there's
23 a different one on the screen than what I think you
24 just said. Yes.

25 Q. And in fact, when you look at Appendix A-3, you

1 see a clear trend to generic potassium chloride, do you
2 not?

3 A. I do.

4 Q. From 25 percent to 30 percent, do you not?

5 A. I do.

6 Q. And you see a clear trend to Klor Con 10 from
7 11 percent to 12 percent, do you not?

8 A. I do.

9 Q. So, there actually has been a shift due to the
10 pricing, has there not?

11 A. I don't think so. I also see a trend to K-Dur
12 20.

13 Q. So, the fact that K-Dur 20 sales are rising is
14 the support for your sentence here. Is that -- is
15 that your position?

16 A. Yes.

17 Q. As you sit here today, can you distinguish
18 whether it's due to pricing or due to marketing that
19 would explain the growth in K-Dur 20?

20 A. The -- the growth in K-Dur 20 is caused by all
21 of the -- all of those factors. There's a price
22 differential, there's -- and others. There's product
23 characteristics, and there is marketing activities.

24 Q. All right. Further down in the second
25 paragraph, you quote SP 23 --

1 A. Wait a minute, I'm back -- where am I? I'm
2 back on this one?

3 Q. On the end note, end note D.

4 A. Thanks.

5 Q. Paragraph 2, SP 2300037-56 at page 39, that is
6 found at tab 3 of the exhibit book we've been using.

7 A. Yes, that's right.

8 Q. Are you there?

9 A. I'm there, sorry.

10 Q. Why don't you turn to page 39. Sir --

11 A. Oh, you mean page 39 in the SP numbers?

12 Q. Yes, sir. I want to compare the document to
13 the end note. The end note reads, "39 notes that these
14 smaller sizes have a '30% price advantage over K-DUR
15 20,' which shows that demanders do not substitute two
16 10 mEq for one 20 mEq."

17 Do you see that?

18 A. Yes.

19 Q. If you direct your attention now to the
20 document, the document says, "The growth in the generic
21 market is due in part to the 30% price advantage over
22 K-DUR 20."

23 Doesn't it say that, sir?

24 A. It does say that.

25 Q. Sir, it does not show that there is not

1 substitution between 10 mEq and one 20 mEq, does it,
2 sir?

3 A. It does not show that there is no substitution.

4 Q. In fact, it doesn't discuss substitution
5 between two 10s and a 20 at all the way your end note
6 advertises this quote, does it, sir?

7 A. No, my end note doesn't advertise it as -- as
8 saying that. That's my -- the "which shows" is my
9 analysis rather than a quote.

10 Q. Well, doesn't your analysis ignore the exact
11 full sentence quote of the underlying business
12 document, sir?

13 A. No.

14 Q. Let me direct your attention to paragraph 3 of
15 end note D. Are you there?

16 A. Yes, I am.

17 Q. "Upsher-Smith, in a document entitled 'Klor Con
18 M 20'" -- strike that, let me -- let me direct your
19 attention there. "Upsher-Smith in a document entitled
20 'Klor Con M20' (version of July, 1997) agreed, saying
21 that K-DUR 20, the Schering product is 'positioned as
22 an innovator - unique, non-substitutable product'
23 which differentiates it in its competition against the
24 8 and 10 mEq strengths (@ USL 06759)."

25 Do you see that?

1 A. I do.

2 Q. Now, could I direct your attention to tab 9 of
3 the Bresnahan cross examination exhibits.

4 Sir, your end note here is quoting the sixth
5 bullet, "Positioned as an innovator - unique,
6 non-substitutable product," is it not?

7 A. Yes.

8 Q. Now, the top of the document says "K-Dur 20,"
9 does it not?

10 A. Yes.

11 Q. And this is an Upsher-Smith document, is it
12 not, which you can tell from the Bates number down at
13 the bottom, USL6759, is it not?

14 A. Yes.

15 Q. Now, directly in the bullet above the bullet
16 that you quote, it says K-Dur 20 "competes directly
17 against the 8 and 10 mEq strengths," does it not?

18 A. Yes.

19 Q. And that doesn't appear in your end note, does
20 it, sir?

21 A. No, my end note says that there is competition
22 against those strengths, but it's not quoting.

23 Q. But you say that it differentiates it in
24 competition, but you ignore the language, don't you,
25 sir, that says it competes directly against the 8 and

1 10 mEq strengths, do you not?

2 A. I don't quote it, but I don't ignore it.

3 Q. Now, this language here about nonsubstitutable,
4 that language is talking about in the pharmacological
5 sense of there not being an A-B substitute at this time
6 for the K-Dur 20, is it not?

7 A. It -- I'm sorry, there were a couple
8 qualifiers in there I lost.

9 MR. GIDLEY: Could I have the question back?

10 (The record was read as follows:)

11 "QUESTION: Now, this language here about
12 nonsubstitutable, that language is talking about in the
13 pharmacological sense of there not being an A-B
14 substitute at this time for the K-Dur 20, is it not?"

15 THE WITNESS: I don't know whether that's the
16 pharmacological sense, but that's one interpretation of
17 the language. They can't be substituted that way.

18 BY MR. GIDLEY:

19 Q. Well, what's the correct reading of this
20 document? Can we tell without having the author of the
21 document here?

22 A. Whether it also implies uniqueness in other
23 kinds of nonsubstitution, no.

24 Q. No, because we're just reading the face of the
25 document, right?

1 A. That's correct.

2 Q. It doesn't necessarily mean at all that there
3 isn't substitution going on in a competition sense
4 between 8 and 10 mEq; it could just mean that there
5 isn't the forced substitution that sometimes occurs to
6 generic products with A-B rated generics. Isn't that
7 correct?

8 A. I don't know why you call it "forced
9 substitution," but it certainly might refer only to
10 substitution by the pharmacist.

11 Q. Now, isn't it also the case that at this point
12 in time, Upsher-Smith believed that K-Dur 20 was
13 "priced competitively"? Isn't that correct?

14 A. Yes.

15 Q. This document doesn't say that it was priced
16 monopolistically, does it, sir?

17 A. No.

18 Q. And this document also indicates that K-Dur 20
19 was being promoted, the fourth bullet, "Promoting
20 through Schering's 1200+ rep sales force and a fully
21 integrated promotional plan."

22 Do you see that?

23 A. I see that.

24 Q. Do you have any reason to doubt that
25 Schering-Plough at this time had that kind of a rep

1 sales force?

2 A. No.

3 Q. You conclude the end note with the sentence,
4 and I'm on the last paragraph of your end note, "This
5 view is not consistent with the possibility of high
6 substitutability of the smaller strengths with the 20
7 mEq strength."

8 Do you see that?

9 A. Yes.

10 Q. Isn't the document we just read inconsistent
11 with that statement?

12 A. No.

13 Q. Let's direct your attention to the next
14 exhibit. We'll mark this for the record. This is end
15 note F and the accompanying text.

16 (USX Exhibit Number 1004 was marked for
17 identification.)

18 MR. GIDLEY: Permission to approach?

19 JUDGE CHAPPELL: Yes.

20 BY MR. GIDLEY:

21 Q. Professor Bresnahan, I have just handed you a
22 USX for identification 1004, which is a sentence from
23 your report supported by end note F and then a
24 reproduction of end note F, and we are quoting from the
25 Bresnahan August 2001 report at page 25 and at pages 43

1 through 44.

2 A. Yes.

3 Q. Directing your attention to the text sentence,
4 the text reads, "Instead, issues like dosing cause
5 health care professionals to view the products as
6 incomplete substitutes."

7 Do you see that?

8 A. Yes.

9 Q. And then the supporting end note is entitled
10 "Dosing and Patient compliance on 20 mEq formulation."

11 A. Yes.

12 Q. Do you see that?

13 A. I do.

14 Q. And the first thing quoted is a Denise Dolan
15 deposition which quotes in part an educated assumption
16 by Ms. Dolan. Isn't that correct?

17 A. Yes.

18 Q. Do you think that's something that ought to be
19 supporting your analysis, an educated assumption?

20 A. Yes, from a -- from a marketing person working
21 in the market.

22 Q. The next citation you have, Professor, is to
23 Dritsas deposition at page 39 ff. Do you see that?

24 A. Yes.

25 Q. Please turn if you would, sir, to tab 10, which

1 is an excerpt from the deposition of Phillip Dritsas,
2 August 1, 2001, and I'm directing your attention to
3 page 2 under tab 10.

4 A. Let me catch up to you. Yes.

5 Q. Now, did you refer to the Dritsas deposition
6 during your direct testimony in this courtroom?

7 A. I think so, yes.

8 Q. My recollection is that you quoted an excerpt
9 on page 40 that begins at line 8. Do you see that?

10 "QUESTION: Why is the 20 mEq tablet more
11 convenient?"

12 A. Yes.

13 Q. Now, the question right before that is in
14 pertinent part:

15 "QUESTION: Would you explain what you mean by
16 the biggest segment in that?

17 "ANSWER: Sure. We have a line of potassium
18 products and so we viewed this as a potassium market
19 and when we look at it, we look at the prescriptions
20 that doctors give to patients for whatever form of
21 potassium they choose to prescribe to meet their needs.
22 In this case most of the patients in this country are
23 prescribed something other than K-Dur 10 or 20 by
24 prescription, but if you look at the dollars,
25 particularly in this market, most of the dollars due to

1 the price of the product are in that K-Dur 20, so we
2 compete with powder, we compete with the effervescent,
3 we compete with the 8 mEq tablet, and compete with the
4 10 mEq tablet and so we have a stated objective to be
5 dominant, if you will, in the market so we can meet all
6 of the needs for a physician for whatever form of
7 potassium he or she chooses to prescribe."

8 Do you see that quote?

9 A. I do.

10 Q. Now, nothing in that quote appears in your end
11 note, does it, sir?

12 A. Let me see. No.

13 Q. In fact, you're quoting Mr. Dritsas' next
14 answer, but you don't quote this answer, do you, sir?

15 A. That's correct.

16 Q. Why did you omit this answer?

17 A. The -- in bringing forward these quotes, as I
18 said yesterday, I was explaining or using the
19 explanation of the managers for their analysis of
20 overall market outcomes, in particular, the overall
21 market outcome that -- here that there was a large
22 sale of K-Dur 20 despite a price premium and the
23 overall market outcome that the -- that generics for
24 K-Dur 20 would compete against it with particular
25 effectiveness. So, I brought quotes that explained why

1 those overall market outcomes would be explained by
2 these managers.

3 Q. You have never met Mr. Dritsas. Is that
4 correct?

5 A. That is correct.

6 Q. You were not present at his deposition. Is
7 that correct?

8 A. That's also correct.

9 Q. Now, are you in any position to judge Mr.
10 Dritsas' credibility sitting here today?

11 A. No, I am not.

12 Q. And sir, just reading the face of the
13 transcript, what about the question and answer I read
14 leads you to exclude the testimony of the 10 and the 8
15 mEqs being in the view of the Upsher-Smith managers a
16 product that competes with K-Dur 20?

17 A. The -- hang on, I missed -- I lost the
18 beginning of the question again.

19 (The record was read as follows:)

20 "QUESTION: And sir, just reading the face of
21 the transcript, what about the question and answer I
22 read leads you to exclude the testimony of the 10 and
23 the 8 mEqs being in the view of the Upsher-Smith
24 managers a product that competes with K-Dur 20?"

25 THE WITNESS: You mean exclude from putting it

1 in my report?

2 BY MR. GIDLEY:

3 Q. Yes.

4 A. No, that's as I just said, the -- that --
5 that it didn't form part of an explanation of those
6 overall market outcomes.

7 Q. Well, in fact, it was inconsistent with the
8 conclusions that you were drawing, was it not?

9 A. No, not necessarily. There can be some
10 substitution. There is some substitution -- there is
11 some substitutes for everything -- anything,
12 particularly something that has elevated its price.

13 Q. So, as I understand your position now, you
14 believe that K-Dur 20 does lose sales to 8 and 10 mEq
15 tablets. Is that not correct?

16 A. I don't know about lose sales. There's some
17 substitution, limited substitution, between those
18 products.

19 Q. And sir, have you done any quantified study to
20 study the interrelationship between the 10 and the 8
21 mEq tablet sales and the 20 -- K-Dur 20 product, sir?

22 A. Only in my comparison of the historical period
23 where only one of those classes was present to the
24 forecasts and the later data where the generic for
25 K-Dur 20 was present as well.

1 Q. Directing your attention to the second
2 paragraph --

3 A. Of?

4 Q. -- of the end note F of the Bresnahan report.

5 A. Yes.

6 Q. It says, "See Dritsas dep at," and then the
7 citation actually is to the 1996 backgrounder.

8 A. Yes, the first four words were a typo here.
9 They were left over.

10 Q. All right. And the document that's referred to
11 again is this passage on 378, and if you would, please,
12 sir, turn to tab 2 --

13 A. Of -- of this?

14 Q. -- of your cross examination exhibits, which is
15 the 1996 backgrounder, CX 746, and that's that same
16 passage where you note a cost difference, correct? I
17 believe that you're quoting the third paragraph on page
18 378. Are you there?

19 A. Yes.

20 Q. All right. And again, in going through the
21 physical and marketing of -- the physical
22 characteristics and marketing of K-Dur 20, there's no
23 mention anywhere in this end note of the size of K-Dur
24 20 and the impact that that has on some patients with
25 compliance, is there?

1 A. That's correct.

2 Q. And in fact, that appears in the paragraph two
3 paragraphs above, "Patient satisfaction with K-DUR is
4 high, despite the fact that many patients remarked that
5 it is 'hard to swallow.'" .

6 Isn't that the case?

7 A. That's right.

8 Q. And in fact, on the next page, Physical
9 Attributes, page 10, SP 23 379, the Schering executives
10 noted in relation to K-Dur that, "The size of the pill
11 makes it difficult to swallow," correct?

12 A. Yes.

13 Q. And that's not going to be found in your
14 report, is it?

15 A. I think that's right.

16 Q. And similarly, the next bullet, side effects
17 such as GI or nausea upset, that's not going to be
18 found in this report either?

19 A. No.

20 MR. GIDLEY: Your Honor, we're at a point where
21 I can take a break or we can keep going. It's whatever
22 Your Honor would like to do this morning.

23 JUDGE CHAPPELL: Let's keep going 10 or 15
24 minutes.

25 MR. GIDLEY: Permission to approach, Your

1 Honor?

2 JUDGE CHAPPELL: Yes, you may.

3 BY MR. GIDLEY:

4 Q. Professor Bresnahan, I've handed you USX 839,
5 and this is an internal marketing piece at
6 Upsher-Smith. Do you see that?

7 A. I do.

8 Q. And it says, "Remind physicians of these key
9 points: Recommend two Klor Con 10 tablets instead of
10 one K-Dur tablet."

11 Do you see that?

12 A. I see -- well, it says, "K-Dur 20."

13 Q. Now, sir, did you review this document in
14 connection with preparing your report?

15 A. I don't think so.

16 Q. Are you seeing this document for the first time
17 today?

18 A. This particular document, yes.

19 Q. Sir, doesn't it indicate that at Upsher-Smith,
20 there was an avowed marketing strategy of seeking
21 doctors to substitute two Klor Con 10 tablets with one
22 Schering K-Dur 20 tablet? Isn't that correct?

23 A. That's correct.

24 Q. And as part of this marketing piece that was to
25 be used with doctors, note is made of the economical

1 price, and this document compares the price of two Klor
2 Con 10 tablets with a K-Dur 20 mEq tablet, does it not?

3 A. Yes.

4 Q. This document also notes that Klor Con 10
5 samples are now available. Do you see that?

6 A. I see that.

7 Q. And what's the significance in this industry of
8 samples being available for doctors?

9 A. It's a -- typically a marketing -- a
10 marketing effort to induce the physician to prescribe
11 that particular product.

12 Q. And the final line in this document says,
13 "Recommend Klor Con for your third-party patients and
14 save your patients 52% every day."

15 Do you see that?

16 A. Yes.

17 Q. Do you see that the price differential between
18 the Klor Con 10 and the K-Dur 20 was a part of the
19 marketing message that Upsher-Smith had at the time of
20 this marketing piece?

21 A. Yes.

22 Q. Do you have any idea whether this was
23 successful or unsuccessful?

24 A. The -- I believe this was somewhat successful
25 but that the largest segment of the market continued to

1 be those who took the 20 milliequivalent tablets, the
2 largest segment measured in dollars.

3 MR. GIDLEY: Permission to approach, Your
4 Honor?

5 JUDGE CHAPPELL: Okay.

6 (USX Exhibit Number 1005 was marked for
7 identification.)

8 BY MR. GIDLEY:

9 Q. Dr. Bresnahan, I've just handed you a USX
10 marked for identification USX 1005. This is an ad
11 dated September of '99 from Upsher-Smith. Do you see
12 that?

13 A. Yes.

14 MR. KADES: Your Honor, this document does not
15 have a Bates number on it. Is this a document that has
16 been provided to us?

17 MR. GIDLEY: I believe it has been provided.
18 We can check the production, Your Honor.

19 BY MR. GIDLEY:

20 Q. Directing your attention to this ad --

21 JUDGE CHAPPELL: Hold on a second. Are you
22 requiring him to check? Can you verify whether or not
23 it's been provided?

24 MR. KADES: I cannot verify whether or not it's
25 been provided, Your Honor.

1 MR. GIDLEY: We can undertake to check, but I
2 would like to proceed with a brief examination on this
3 document, Your Honor.

4 JUDGE CHAPPELL: What's your objection?

5 MR. KADES: Well, if we've not received the
6 document during discovery, we would object on the basis
7 of surprise and unfair prejudice. I'm willing -- I
8 think I'm -- we'd be willing to allow Mr. Gidley to
9 question the witness subject to verification that we
10 have, in fact, received this document, and if not,
11 being allowed to restate the objection and strike the
12 testimony.

13 MR. GIDLEY: Your Honor, it's also my
14 understanding that this is an ad that appeared in some
15 medical journals, so it may well also appear in the
16 public domain. We could check the status of its
17 production.

18 JUDGE CHAPPELL: The fact that it's in the
19 public domain doesn't mean you produced it in a
20 discovery response, Mr. Gidley.

21 MR. GIDLEY: I don't know whether we did or did
22 not.

23 JUDGE CHAPPELL: The other side is not
24 responsible to review the public domain. That doesn't
25 count, okay?

1 MR. GIDLEY: Yes, Your Honor.

2 JUDGE CHAPPELL: So, whether or not it's in the
3 public domain is not relevant to this point, just so
4 we're clear.

5 MR. GIDLEY: Yes.

6 JUDGE CHAPPELL: What I need to know is whether
7 it was provided to opposing counsel.

8 MR. GIDLEY: I do not have a Bates numbered
9 version of this document at this time.

10 JUDGE CHAPPELL: I will overrule the objection
11 at this time, because I understood you were withdrawing
12 it subject to verifying whether or not you have the
13 document. Is that right?

14 MR. KADES: Yes, Your Honor. We're not -- I
15 mean, as long as we've gotten the document, we
16 obviously don't have a problem with Mr. Gidley using
17 it. We just wanted to get that on the record at this
18 point in time.

19 JUDGE CHAPPELL: With that understanding, I'll
20 allow you to proceed.

21 MR. GIDLEY: Very good, Your Honor.

22 BY MR. GIDLEY:

23 Q. Professor Bresnahan, directing your attention
24 to this ad that is an ad that Upsher-Smith placed for
25 Klor Con 10, it says, "Prescribe The Economical K,"

1 does it not?

2 A. Yes.

3 Q. Directing your attention on the right-hand side
4 of the document, it says, bullet, "Patients may save up
5 to 56% per prescription by taking two Klor Con 10 mEq
6 Tablets instead of one K-Dur 20 Tablet."

7 Do you see that?

8 A. I do.

9 Q. And isn't this, in fact, a price comparison ad
10 where Upsher-Smith is using the price differential to
11 sell Klor Con 10, are they not?

12 A. Yes, that's my understanding of it.

13 Q. There's a picture down below of a prescription
14 pad, and written on the prescription pad in this ad is,
15 "Klor Con 2X10 mEq."

16 Do you see that?

17 A. I do see that.

18 Q. And sir, if a doctor writes, "Klor Con 2X10
19 mEq" rather than "K-Dur 20," the prescription cost at
20 the point of writing that prescription is, in fact,
21 zero, is it not?

22 A. At that point there's no switching cost, that's
23 right.

24 MR. GIDLEY: Just one minute, Your Honor.

25 Permission to approach, Your Honor?

1 JUDGE CHAPPELL: You may.

2 BY MR. GIDLEY:

3 Q. Professor Bresnahan, you have been handed USX
4 480, which is a form letter that Upsher-Smith was
5 sending for -- was preparing to send to doctors with
6 the Bates number of USL03287.

7 Do you see that?

8 A. I do.

9 Q. Directing your attention to the second
10 paragraph of this letter that is over the signature of
11 Phillip Dritsas, and again, this is a form letter, so
12 it's not signed, it says, "If you are writing
13 prescriptions for 20 mEq of potassium per day, Klor-Con
14 10 Tablets costs only 36 cents per day. This
15 represents a 25% savings verses (sic) the leading brand
16 of 20 mEq potassium tablets."

17 Do you see that?

18 A. I do.

19 Q. And what is the leading 20 mEq potassium tablet
20 that's being referred to in that sentence?

21 A. Well, I -- I -- it's K-Dur 20 I'm sure.

22 Q. And sir, at the time that this was prepared,
23 and I believe that was May 1999, which you can tell
24 from the MDD number at the bottom of the document --

25 A. I see.

1 Q. -- Upsher-Smith was investing in advertising
2 messages and marketing materials to doctors to compete
3 two Klor Con 10 tablets against the 20 mEq K-Dur 20,
4 were they not?

5 A. Yes.

6 Q. And this document does not appear in your end
7 notes, does it, sir?

8 A. No, it does not.

9 Q. And it doesn't appear in your report, does it,
10 sir?

11 A. No, it does not.

12 MR. GIDLEY: Permission to approach, Your
13 Honor?

14 JUDGE CHAPPELL: You may.

15 (USX Exhibit Number 1006 was marked for
16 identification.)

17 BY MR. GIDLEY:

18 Q. Professor Bresnahan, I've handed you USX
19 Exhibit 1006, and this is a color and black and white
20 version of an ad that Upsher-Smith prepared. I've
21 included a copy of the Bates number pages in black and
22 white interspersed in this exhibit.

23 Sir, directing your attention to the page
24 entitled Introduce your Patients to Klor-Con 10
25 Tablets, do you see that?

1 A. Yes.

2 Q. Now, this document, prepared by Upsher-Smith,
3 is a document that compares Klor Con 10 to other
4 potassium supplement costs, does it not?

5 A. Yes.

6 Q. And among the products that Upsher-Smith was
7 marketing against at this time was K-Dur 20, were they
8 not?

9 A. Yes, that's one of the three listed here.

10 Q. And in fact, this ad is intended to compete the
11 Klor Con 10 tablets versus the K-Dur 20 tablets, are
12 they not -- is it not?

13 A. Yes, that's my understanding.

14 Q. Now, sir, the price difference between the
15 Micro-K 10 and the K-Dur 20 is 41 versus 42 cents,
16 isn't that correct, in this document?

17 A. Yes. I mean, it says "average therapy cost per
18 day," but I think it means cost in the sense of price
19 to someone.

20 Q. And sir, is the difference between -- a penny
21 between 41 cents versus 42 cents a significant
22 difference in your view?

23 A. Not always. It depends on the volume.
24 Probably not here.

25 Q. Well, do you think it's more than a 5 percent

1 price difference, sir, between the Micro-K 10 and the
2 K-Dur 20?

3 A. I'm sure it's less than a 5 percent difference.

4 Q. And Micro-K 10, who had -- who had that as
5 their product? What firm had Micro-K 10 as a product?

6 A. Another -- another firm, I forget the name of
7 the firm.

8 Q. This document also shows K-Dur 10 and K-Dur 20.
9 Do you see that?

10 A. I do.

11 Q. And do you see that the price of K-Dur 10 is a
12 little bit larger than the price of K-Dur 20? Do you
13 see that?

14 A. Yes, I do see that.

15 Q. Is this a document you've studied before, sir,
16 in preparing your report?

17 A. No, I've never seen this document before you
18 gave it to me.

19 Q. Directing your attention to the next page,
20 which is entitled Klor-Con Quality, and we have it both
21 in black and white and in color, the second bullet
22 reads, "Well tolerated and well accepted by patients."

23 Do you see that?

24 A. I do.

25 Q. And that's a marketing message from

1 Upsher-Smith in this time period about its Klor Con 10
2 product, is it not?

3 A. Yes.

4 Q. As you sit here today, do you have any reason
5 to believe that that marketing message is a false
6 message?

7 A. No.

8 Q. At the bottom of the page, do you see that
9 reference is made to K-Dur? "K-Dur is a registered
10 trademark of Key Pharmaceuticals."

11 A. Yes.

12 Q. Sir, have you reviewed any Upsher-Smith ads in
13 preparing your August 15, 2001 report?

14 A. Yes, I believe I looked at an online ad.

15 Q. An online ad? So, you looked at a current ad
16 in, what, the August 2001 time period?

17 A. Or a little earlier than that.

18 Q. But during the year 2001?

19 A. Yes.

20 Q. You didn't look at ads before 2001. Is that
21 correct?

22 A. I -- I don't -- I don't recall an ad from
23 earlier than that.

24 Q. How about other companies, did you look at ads
25 for Micro-K 10 in preparing your report?

1 A. No, I did not.

2 Q. How about ads for other companies, companies
3 such as Novartis or Bristol-Myers Squibb that at this
4 time were selling potassium chloride products?

5 A. No.

6 Q. Did you ask complaint counsel to subpoena
7 documents from the other pharmaceutical companies that
8 sold potassium chloride in the period 1995 to 2001?

9 A. No.

10 Q. Did you ask complaint counsel to subpoena
11 pricing data from those companies for their potassium
12 chloride products from 1995 to 2001?

13 A. I did not.

14 Q. Were you provided marketing messages -- strike
15 that.

16 Were you provided pricing data from any
17 competitor of Klor Con -- of potassium chloride from
18 1995 to 2001?

19 A. You mean data provided by that firm?

20 Q. Data that would come from the internal files of
21 any of the firms that sell potassium chloride in terms
22 of their monthly sales or monthly prices.

23 A. Other than -- other than the three parties or
24 -- how do you call them -- other than Upsher-Smith,
25 ESI and Schering, I don't think I had any such data

1 from any other firms' files.

2 Q. So, the three you just referred to would be
3 Upsher-Smith, Schering-Plough and American Home
4 Products/ESI Lederle. Is that correct?

5 A. Yes, that's right.

6 Q. No other firm?

7 A. No, no -- I don't think there's any pricing
8 data from the files of any other firm.

9 MR. GIDLEY: Permission to approach, Your
10 Honor?

11 JUDGE CHAPPELL: You may.

12 MR. KADES: Your Honor, once again, we would
13 raise the same objection given that I do not see a
14 Bates number on this document.

15 MR. GIDLEY: Your Honor, my understanding of
16 this document is that it's not an Upsher-Smith
17 document, that we have obtained it from Schering-Plough
18 in connection with this case. It does not have a Bates
19 number, but it's not something that would be found
20 among the Upsher-Smith documents to the best of my
21 knowledge.

22 JUDGE CHAPPELL: Are you planning on
23 introducing this into evidence or questioning the --

24 MR. GIDLEY: No, Your Honor, I am only using it
25 for identification to ask a few questions. I am not

1 offering it as an exhibit, for the truth of the matter
2 in the exhibit.

3 MR. KADES: Your Honor, the point remains that
4 this is a document which apparently the FTC has not
5 received.

6 JUDGE CHAPPELL: I think it's -- I think on
7 cross examination, I'm going to allow him to ask an
8 expert if he's aware of this. I'm not going to allow
9 this in as substantive evidence of anything, Mr. Kades,
10 but I think it's fair to allow an expert who's giving
11 as many opinions as we've heard from this witness
12 whether he was aware of certain things, and that
13 doesn't go to whether or not we have a discovery
14 problem, but I believe if I don't allow anything
15 substantive from it, there's no prejudice.

16 MR. GIDLEY: Thank you, Your Honor.

17 JUDGE CHAPPELL: So, I'll overrule.

18 (USX Exhibit Number 1007 was marked for
19 identification.)

20 BY MR. GIDLEY:

21 Q. Professor Bresnahan, you've been handed what
22 appears to be an advertisement that Schering-Plough at
23 one time placed for its K-Dur 20 product. Do you see
24 that?

25 A. I do.

1 Q. And it says, "When Compliance Matters -
2 Convenience Counts. K-Dur 20 mEq - For Greater
3 Convenience Can Be Taken Whole, Halved or Dispersed in
4 Water for a Taste-Free Beverage."

5 Do you see that?

6 A. I do see that.

7 Q. Sir, in connection with preparing your report,
8 have you studied what percentage of K-Dur patients
9 break the K-Dur 20 tablet in half?

10 A. I have not.

11 Q. Have you seen any data on the number of
12 patients that take K-Dur 20 that break the tablet in
13 half?

14 A. No, I have not.

15 Q. Are you aware, sir, that the tablet is scored
16 so that it can easily be broken in half?

17 A. I think I have heard that.

18 Q. Have you physically compared two halves of a
19 K-Dur 20 to the size of a Klor Con 10 tablet in
20 preparing your August 15, 2001 report?

21 A. No, I have not.

22 Q. Was the first time that you saw a demonstration
23 like that during Mr. Curran's opening in this case?

24 A. Or Mr. Nields, I'm not sure.

25 Q. But was it --

1 A. But Wednesday.

2 Q. Okay, but during the openings, that's the first
3 time that you actually physically compared the two
4 products or saw such a demonstration?

5 A. That's correct.

6 Q. Did you examine the products at all before --
7 in preparing your August 15 report? Did you physically
8 examine the products?

9 A. I did not.

10 MR. GIDLEY: Permission to approach, Your
11 Honor?

12 JUDGE CHAPPELL: You may.

13 MR. KADES: Your Honor, the witness has been on
14 the stand I think close to an hour and a half, and if
15 we could get a break soon, I think in fairness to the
16 witness --

17 JUDGE CHAPPELL: I was considering whether we
18 would just take our lunch break or take a short break.

19 Professor, do you need a break or can you go
20 another 15 minutes?

21 THE WITNESS: I would very much like a break,
22 Your Honor.

23 MR. GIDLEY: No objection, Your Honor.

24 JUDGE CHAPPELL: Okay, it's almost 11:15. Why
25 don't we break until -- we will recess until 11:30.

1 (A brief recess was taken.)

2 JUDGE CHAPPELL: Let's reconvene docket 9297.

3 You may proceed, Mr. Gidley.

4 MR. GIDLEY: Thank you, Your Honor.

5 BY MR. GIDLEY:

6 Q. Dr. Bresnahan, when did Schering-Plough begin
7 selling K-Dur 20 in the United States?

8 A. I believe in the late 1980s.

9 Q. And sir, before the late 1980s, what did
10 hypokalemic patients take to meet their potassium
11 needs?

12 A. I don't know, but I presume they took other
13 potassium supplements.

14 Q. Sir, would it surprise you that they were
15 taking 10 mEq tablets to meet their needs, whatever
16 those daily needs were? Would that surprise you?

17 A. No, that would not.

18 MR. GIDLEY: Permission to approach, Your
19 Honor?

20 JUDGE CHAPPELL: You may.

21 (USX Exhibit Number 1002 was marked for
22 identification.)

23 BY MR. GIDLEY:

24 Q. Dr. Bresnahan, I've handed you what's been
25 marked for the record as USX 1002, and it's an excerpt

1 from the patient package insert for K-Dur 20. Do you
2 see that document?

3 A. I do.

4 Q. And what is a patient package insert?

5 A. When you open the package box containing the
6 drug, in it along with the bottle of pills there's a
7 flyer for the patient.

8 Q. And that flyer is a patient package insert,
9 correct?

10 A. That's what it's called.

11 Q. What's your understanding of the FDA's
12 regulation of patient package inserts and the
13 statements contained therein?

14 A. I don't have a full understanding of that or
15 the particularities of the regulations that the FDA
16 puts on those.

17 Q. Now, sir, do you know whether these are
18 submitted in draft form to the FDA for review?

19 A. I don't know. I would be surprised if they
20 were not.

21 Q. Sir, do you have any idea what the FDA does to
22 assure the accuracy of statements that are contained in
23 patient package inserts as you sit here today?

24 A. No, I haven't studied that process in detail.

25 Q. Directing your attention to USX 1002 and in

1 particular the first several sentences, the PPI for
2 K-Dur 20, this excerpt -- this is not the entire PPI,
3 but this excerpt is under the heading Gastrointestinal
4 Lesions, L E S I O N S, "Solid oral dosage forms of
5 potassium chloride can produce ulcerative and/or
6 stenotic lesions of the gastrointestinal tract. Based
7 on spontaneous adverse reaction reports, enteric coated
8 preparations of potassium chloride are associated with
9 an increased frequency of small bowel lesions (40-50
10 per 100,000 patient years) compared to sustained
11 release wax matrix formulations (less than one per
12 100,000 patient years). Because of the lack of
13 extensive marketing experience with microencapsulated
14 products, a comparison between such products and wax
15 matrix or enteric coated products is not available."

16 Do you see that?

17 A. Yes, I see that.

18 Q. And of the products we've been discussing in
19 your cross examination, what are some examples of the
20 wax matrix potassium chloride products, sir?

21 A. The Klor Con product is one.

22 Q. So, Klor Con 8 and Klor Con 10 are wax matrix
23 potassium chloride products, are they not?

24 A. I believe that's right.

25 JUDGE CHAPPELL: Mr. Gidley, excuse me, if you

1 are going to use the ELMO, I think you are going to
2 need to zoom in or focus.

3 MR. GIDLEY: Thank you, Your Honor.

4 BY MR. GIDLEY:

5 Q. And K-Dur 20 is a microencapsulated potassium
6 chloride, is it not, sir?

7 A. Yes.

8 Q. Now, at the time that this PPI was written,
9 wasn't it the case that no comparison could be drawn
10 between the gastrointestinal lesion experience between
11 wax matrix and the microencapsulated products? Isn't
12 that correct?

13 A. Well, I don't know about -- no comparison in
14 the sense of this document, whatever that is.

15 Q. Have you ever studied this document before?

16 A. No, I have not.

17 Q. You didn't review this document in preparing
18 your August 2001 report?

19 A. I did not.

20 Q. Sir, throughout the course of this examination,
21 we have examined a number of Schering-Plough marketing
22 documents, have we not?

23 A. Yes.

24 Q. And are you aware of any Schering business
25 document that states that K-Dur 20 had a 100 percent

1 market share of a 20 mEq only product market in those
2 words?

3 A. No, not in those words.

4 Q. Have you seen any Schering-Plough document that
5 expresses 100 percent in terms of "market share" with
6 respect to the sale of K-Dur 20 products?

7 A. No, not in those words.

8 Q. In fact, sir, in the years 1995 to 2001, are
9 you aware of any Schering-Plough document that in terms
10 of the words "market share" expresses a market share
11 for K-Dur 20 in excess of 70 percent?

12 A. No, I am not.

13 Q. Are you aware of any such document expressing a
14 market share, in those words, "market share," for K-Dur
15 20 in excess of 60 percent "market share"?

16 A. No, I am not.

17 MR. GIDLEY: Your Honor, this next exhibit is
18 one that is an in camera document, and to protect the
19 confidentiality of the document, I would ask that we
20 take it in camera.

21 JUDGE CHAPPELL: At this time, we are going to
22 have to clear the public from the courtroom. We are
23 going to look at a document that's been designated in
24 camera, meaning not for public viewing. So, if you're
25 not subject to the protective order entered in this

1 case, you are going to need to leave the courtroom, and
2 I will have someone notify you when we're through the
3 in camera portion.

4 (The in camera testimony continued in Volume 5,
5 Part 2, Pages 1065 through 1076, then resumed as
6 follows.)

7 JUDGE CHAPPELL: Okay, Mr. Gidley, you may
8 proceed when ready.

9 BY MR. GIDLEY:

10 Q. Professor Bresnahan, it is possible to study
11 the effects of advertising on market share for the
12 sales of branded pharmaceuticals, is it not?

13 A. I believe it's possible to study that. The --
14 I haven't studied it.

15 Q. Sir, in fact, specifically, it's possible to do
16 econometric analyses of the impact of detailing or ads
17 in medical journals on the sale of branded
18 pharmaceuticals, is it not?

19 A. It may be.

20 Q. You haven't done that in this case. Is that
21 correct?

22 A. That's correct.

23 Q. In fact, a good example of that kind of
24 analysis appears in one of the chapters of your book,
25 The Economics of New Goods, does it not?

1 A. I think that's right.

2 Q. Now, you said that -- you commented on I think
3 one of the articles in that book. Is that correct?

4 A. Yes.

5 Q. Was that Professor Hausman's article?

6 A. Yes.

7 Q. And what was the product that Professor Hausman
8 was examining?

9 A. Those were breakfast cereals.

10 Q. Specifically Apple Cinnamon Cheerios, that was
11 the new good. Is that correct?

12 A. Yes. It was in the context of other breakfast
13 cereals. That was the one he was particularly focusing
14 on.

15 Q. Well, sir, isn't it the case that in the entire
16 book, there is a single chapter devoted to the
17 pharmaceutical industry, and that's chapter 7, a paper
18 by Ernst Berndt? Isn't that correct?

19 A. I think that's right, possibly with other
20 authors.

21 Q. And did you review that article specifically in
22 preparation for your August 2001 report?

23 A. No.

24 MR. GIDLEY: Permission to approach, Your
25 Honor?

1 JUDGE CHAPPELL: You may.

2 (USX Exhibit Number 1009 was marked for
3 identification.)

4 BY MR. GIDLEY:

5 Q. Professor Bresnahan, you've been handed USX
6 1009, which is chapter 7 from The Economics of New
7 Goods, your book, and it's a study by Ernst Berndt and
8 his colleagues of the H2 receptor antagonist,
9 specifically antiulcer drugs, is it not?

10 A. Yes, I believe it is.

11 Q. Directing your attention to page 277 of your
12 book, this is a study specifically of Tagamet, Zantac,
13 Pepcid and Axid, was it not?

14 A. I believe that's right.

15 Q. Let me direct your attention to the bottom of
16 page 289. The first antiulcer drug that's in the scope
17 of this study was Tagamet, and Zantac entered later,
18 and I'm at the bottom of page 285.

19 A. Oh, I thought you said 289, I'm sorry. Where
20 are we?

21 Q. 285, at the bottom of the page. Are you there?

22 A. I'm at the bottom of page 285, but I don't see
23 the quote you just started.

24 Q. I'm about to read it.

25 A. Oh, okay.

1 Q. "When Zantac entered in late 1983, it charged a
2 substantial premium (\$1.25," turn the page to 289,
3 where the sentence continues, "per day, a 56 percent
4 premium). Thereafter, prices of both Zantac and
5 Tagamet rose with time, although Tagamet's prices
6 increased more rapidly. By the end of the sample, the
7 Zantac price premium had narrowed from 56 percent to 25
8 percent."

9 Do you see that?

10 A. Yes.

11 Q. Now, looking at that one bit of economic data,
12 are you able to determine sitting here today whether
13 that alone would be evidence of a monopoly by one brand
14 versus another brand of antiulcer drug?

15 A. No.

16 Q. And that's despite the fact that at one point
17 in time there's a 56 percent pricing premium and at
18 another point in time there's a 25 percent pricing
19 premium, correct?

20 A. That's right.

21 Q. Directing your attention to the third
22 paragraph, "Pricing policy, however, is not the only
23 instrument for competitive rivals. In the U.S.
24 pharmaceutical industry, marketing plays a very
25 significant role."

1 Do you see that?

2 A. I do.

3 Q. Is that a statement you reviewed in connection
4 with the preparation of your August report?

5 A. No.

6 Q. Let me direct your attention very quickly to
7 some of the conclusions that were drawn in this study
8 of the antiulcer branded drugs.

9 Sir, do you recall what methodology was used by
10 the authors in comparing the sales and the impact of
11 marketing and advertising?

12 A. By these authors?

13 Q. By these authors, yes, sir.

14 A. Yes, I believe they had a relative market share
15 or relative demand regression.

16 Q. They did an econometric --

17 A. But I don't recall the details.

18 Q. They did an econometric regression. Is that
19 correct?

20 A. Yes, their methodology was econometric.

21 Q. And do you recall that they looked at medical
22 advertising journal pages, they also looked at
23 detailing contacts? Do you recall that?

24 A. No, but I -- but I wouldn't be surprised.

25 Q. And then they took that data over a time

1 period, and controlling for certain variables, came to
2 certain conclusions about the impact of marketing and
3 advertising, did they not?

4 A. Yes.

5 Q. Please direct your attention to the bottom of
6 page 310, Section 7.6, Concluding Remarks, page 310.
7 It's the bottom of page 310, the paragraph begins
8 "First."

9 "First, marketing efforts such as detailing and
10 medical journal advertising have long-lived impacts."

11 Do you see that?

12 A. Yes.

13 Q. Is that something that you considered
14 specifically in preparing your report?

15 A. No.

16 Q. Directing your attention to page 311, the
17 second full paragraph that begins with the word "Second
18 --"

19 A. Actually, Mr. Gidley, I may have answered too
20 fast. Could we go back to the last question?

21 (The record was read as follows:)

22 "QUESTION: Please direct your attention to the
23 bottom of page 310, Section 7.6, Concluding Remarks,
24 page 310. It's the bottom of page 310, the paragraph
25 begins 'First.' .

1 "'First, marketing efforts such as detailing
2 and medical journal advertising have long-lived
3 impacts.' .

4 "Do you see that?

5 "ANSWER: Yes.

6 "QUESTION: Is that something that you
7 considered specifically in preparing your report?"

8 THE WITNESS: Okay, so no, not the quote from
9 Berndt and his colleagues, but yes, this idea was in my
10 mind.

11 BY MR. GIDLEY:

12 Q. Okay, the idea was in your mind, but where in
13 your report do you discuss the long-term impacts of
14 medical advertising through methods such as detailing
15 and medical journal advertising? That's not in your
16 report, is it, sir?

17 A. No, I don't discuss it.

18 Q. It's not in your rebuttal report, is it?

19 A. I don't think so.

20 Q. Directing your attention to page 311, the
21 paragraph that begins, "Second." The authors conclude,
22 "Second, we find that at the industry level, both
23 cumulative minutes of detailing and cumulative pages of
24 medical journal advertising affect sales," and skipping
25 down to the final sentence of that paragraph,

1 "Together," and they are discussing some of their
2 quantitative results, "these results imply that the
3 marketing efforts of firms in the antiulcer drug market
4 had substantial effects, in terms of affecting both
5 market share and the size of the overall industry."

6 Do you see that?

7 A. Yes.

8 Q. And they were able to do that through their
9 quantitative -- their quantitative estimates that were
10 derived from econometric methods, correct?

11 A. That's the methods they used, yes.

12 Q. Right. And you have not done a similar
13 approach in your own product market work in this case
14 with respect to K-Dur 20, have you, sir?

15 A. No, that's correct.

16 Q. Turning your attention to page 314, at the top
17 of page 314, there's a long note called Appendix, Data
18 Sources from IMS America. Do you see that?

19 A. Yes.

20 Q. And the authors, in looking at the four ulcer
21 drugs, they looked at IMS data, did they not, sir?

22 A. They did.

23 Q. And it's your testimony that IMS data is an
24 accurate way to look at the sales for a pharmaceutical
25 product, be it branded or generic?

1 A. I don't know about the accuracy. It is the
2 data source on which research firms and many marketing
3 people rely.

4 Q. And sir, you rely on IMS data as well, don't
5 you?

6 A. Yes.

7 Q. In fact, you relied on it for at least one of
8 the slides that you prepared, the one that is January
9 to November 2001 that you used on direct, did you not?

10 A. That's correct.

11 Q. That data was from IMS?

12 A. Yes.

13 MR. GIDLEY: Your Honor, to move this along, I
14 am going to go ahead and put on the ELMO a marked-up
15 version of CX 1586. I'm going to see if I can get
16 this -- Professor Bresnahan, are you able to see that
17 on your screen?

18 THE WITNESS: I can't read the print, but this
19 -- the print is the same as the other one we were
20 looking at, right?

21 MR. GIDLEY: Permission to approach, Your
22 Honor? I've got a hard copy.

23 JUDGE CHAPPELL: You may.

24 THE WITNESS: Thank you. Whoops. Got it.

25 BY MR. GIDLEY:

1 Q. I've handed you a copy of CX 1586. Do you see
2 that, sir?

3 A. Yes.

4 Q. It's entitled Estimated TRX for Selected
5 Potassium Chloride Products, January 2001 to November
6 2001. Do you see that?

7 A. I do.

8 Q. And this slide is a slide that was used with
9 your direct examination, was it not?

10 A. I think so, yes.

11 Q. Now, the data that underlies this slide is from
12 IMS, is it not?

13 A. Yes.

14 Q. Can you tell me what exactly makes up the two
15 bars? We have one bar which is K-Dur 20, correct?

16 A. Yes.

17 Q. And you took data from IMS and extracted the
18 K-Dur 20 data. Is that correct?

19 A. Yes.

20 Q. The bar that says "Generic K-Dur 20"?

21 A. Yes.

22 Q. What's contained in these plots that you've
23 used? What firms are combined in generic K-Dur 20?

24 A. I -- the -- I think in particular
25 Upsher-Smith and Schering.

1 Q. Anyone else?

2 A. Not to my knowledge.

3 Q. And when you say "Upsher-Smith," you didn't
4 include all of the Upsher-Smith products, correct?

5 A. That's correct.

6 Q. Of the Upsher-Smith potassium chloride
7 products, you selected out the Klor Con M20 product.
8 Is that correct?

9 A. I believe that's right, yes.

10 Q. So, this is a plot -- to summarize, this is a
11 plot of K-Dur 20 against the Upsher-Smith Klor Con M20,
12 correct?

13 A. Well, and Warrick, I think.

14 Q. Okay, sir. Is Warrick represented on CX 1586?

15 A. I believe they're in the generics, yes.

16 Q. So, let me make sure I have that clear in my
17 mind. Generic K-Dur 20 is a combination, the sum, of
18 the Warrick 20 mEq potassium chloride generic as well
19 as the Klor Con M20 20 mEq tablet. Is that correct?

20 A. I think that's right, yes.

21 Q. And this data came from IMS?

22 A. Yes.

23 MR. GIDLEY: Permission to approach, Your
24 Honor?

25 JUDGE CHAPPELL: You may.

1 (USX Exhibit Number 1010 was marked for
2 identification.)

3 BY MR. GIDLEY:

4 Q. Professor Bresnahan, I've handed you what's
5 just been marked 1010, and my understanding is that
6 this is a printout of the diskette that was produced in
7 connection with your deposition from IMS data. Why
8 don't you take a second and familiarize yourself with
9 these pages.

10 MR. KADES: Your Honor, counsel did not provide
11 us with a hard copy of the document, and I can't read
12 -- okay, thank you.

13 BY MR. GIDLEY:

14 Q. Professor Bresnahan, this is a printout of a
15 portion of IMS data for potassium chloride supplements,
16 is it not?

17 A. I think it is. I've looked at this -- what I
18 think is this spreadsheet only on the screen, not in a
19 printout.

20 Q. Well, what are you -- are you looking now at
21 the Exhibit 1010, sir?

22 A. Yes.

23 Q. And you've seen this on the screen in
24 electronic form previously?

25 A. I think so.

1 Q. And this is, in fact, the categories that IMS
2 uses to describe potassium chloride, is it not?

3 A. Yes.

4 Q. And that number 60110 is a category code of the
5 IMS data, is it not?

6 A. Yes, I believe that's right.

7 Q. That's not your code number, is it, sir?

8 A. No.

9 Q. That comes with the data. So, IMS --

10 A. I'm sorry, yes.

11 Q. So, IMS has a category for potassium chloride
12 supplements, does it not, with the number 60110,
13 correct?

14 A. I believe that's right.

15 Q. And underneath that category are categories of
16 tablet/cap forms, other forms, orals and other
17 systemics, is it not?

18 A. Yes.

19 Q. And included in that are K-Dur 10 and 20, are
20 they not?

21 A. Yes.

22 Q. And moving along, it's also got branded
23 tab/caps, which is capsules, correct?

24 A. Yes, caps is capsules, as I understand it.

25 Q. Right. And the IMS data has in this printout

1 Micro-K, Micro-K 10, Slow K, K-Tab, Klor Con 8, Klor
2 Con 10, Klor Con M10, Klor Con M20, general KCl
3 tab/cap, other tab/caps, generic K-Dur, Warrick, all
4 other, other forms, all other KCl 20, all other forms,
5 all other brands and all other potassium chloride, does
6 it not?

7 A. I didn't see the last one, but up until then I
8 was with you.

9 Q. The last one was all other potassium chloride
10 at the bottom.

11 A. Oh, all other, yes, all other.

12 Q. Right. So, in preparing CX 1586, you stripped
13 out the lines for K-Dur 20, correct, and that's what
14 you used as your data source for the K-Dur 20 quantity?

15 A. I think so, yes.

16 Q. And you also pulled out Warrick and Klor Con
17 M20, correct?

18 A. I think that's right, yes.

19 Q. But the rest of this data didn't make the cut
20 for CX 1586, correct?

21 A. No, the rest of these data are not in this --
22 this plot.

23 MR. KADES: Your Honor, I have to object. I
24 believe that the chart that -- I think the question
25 mischaracterizes what the chart is based on. It was

1 based on monthly data. This particular printout is
2 weekly data.

3 MR. GIDLEY: Your Honor, all of my questions
4 are about the IMS categories as appear in any data set
5 that one obtains from IMS, and I'm happy to make that
6 clear.

7 JUDGE CHAPPELL: Well, I'm going to overrule
8 the objection, because the witness said "no" to the
9 question. I think if the witness -- it's up to the
10 witness to correct if the question is incorrect, to say
11 "no" or to disagree, but based on that, I'll overrule.

12 BY MR. GIDLEY:

13 Q. Professor Bresnahan, these categories come
14 directly from IMS, do they not?

15 A. You mean the categories down the row steps
16 here?

17 Q. The categories on 1010, don't those categories
18 come directly from IMS?

19 A. Yes.

20 Q. You didn't alter those categories in this
21 printout; this printout comes straight out of the IMS
22 data. Isn't that correct?

23 A. I believe that's right.

24 Q. All right. But then in preparing CX 1586, you
25 culled out the three lines, the data pertaining to

1 K-Dur 20, Klor Con M20 and that Warrick data, correct?

2 A. Culled? I mean, those are the data that are on
3 the chart.

4 Q. And the rest of the data doesn't make the
5 chart, right?

6 A. The rest of the data -- that's right.

7 Q. Professor Bresnahan, I want to change subjects
8 and talk a little bit about time. The agreement
9 between Upsher-Smith and Schering-Plough was entered
10 into as of June 17, 1997, correct?

11 A. Yes, or a week later.

12 Q. But in June 1997, correct?

13 A. Yes.

14 Q. And the '743 patent expired on September 5,
15 2006, did it not?

16 A. That's right, that's my understanding.

17 Q. Just to make things a little bit simpler, I
18 want you to think about the date September 1, 2006. Do
19 you have that?

20 A. Okay.

21 Q. If you go back nine years, you go to September
22 1, 1997, correct?

23 A. Yes, that's right.

24 Q. All right. Nine times twelve is 108, is it
25 not, sir?

1 A. Yes.

2 Q. And you, in fact, have in your report the
3 observation that there are 108 months between September
4 1, 1997 and September 1, 2006, do you not?

5 A. I think so, yes.

6 Q. Now, sir, if we add back in the whole months of
7 July and August 1997, we have 110 months, do we not?

8 A. Yes.

9 Q. All right. So, in other words, from July 1,
10 1997 to September 1, 2006 is a period of 110 months, is
11 it not, sir?

12 A. Yes.

13 Q. All right, sir. And I've got a demonstrative,
14 because it's just a little bit easier to conduct this
15 examination staring at an actual sheet of paper. I
16 show you what's marked Upsher-Smith 1011.

17 (USX Exhibit Number 1011 was marked for
18 identification.)

19 BY MR. GIDLEY:

20 Q. I simply mark it for identification purposes at
21 this time. What I've done, sir, is --

22 A. Could I have a copy of that? It's hard to read
23 on the screen.

24 Q. Yes.

25 A. Thank you.

1 Q. So, my next questions are just about
2 chronology.

3 Sir, from July 1, 1997 to September 1, 2006, in
4 terms of complete months, it's 110 complete months,
5 correct?

6 A. Yes.

7 Q. And the halfway point as a matter of chronology
8 would be February 1, 2002, would it not, sir?

9 A. Yes, as a matter of chronology, I think that's
10 right.

11 Q. Now, the June 17, 1997 agreement provided for
12 an entry date no later than September 1, 2001, did it
13 not?

14 A. No earlier than that is what it says, but at
15 that date.

16 Q. Well, isn't there an exception if
17 Schering-Plough introduces a Warrick generic drug?

18 A. Yes, there is.

19 Q. So, it's not September 1 if Schering introduces
20 a Warrick generic drug, is it?

21 A. That's correct.

22 Q. In fact, as soon as Schering introduces a
23 Warrick generic drug, at that point in time,
24 Upsher-Smith could enter the market before September 1,
25 2001. Isn't that correct?

1 A. If they had, yes.

2 Q. All right, sir. Otherwise, the date for entry
3 for Upsher-Smith is September 1, 2001, correct?

4 A. Yes.

5 Q. And just in terms of a chronological
6 calculation, the difference between September 1, 2006
7 and September 1, 2001 is 60 months, is it not?

8 A. Yes.

9 Q. Right, 110 minus 50 equals 60, correct?

10 A. Yes, that's correct.

11 Q. All right. And that's approximately 54 or 55
12 percent of the time interval between July 1, 1997 and
13 September 1, 2006, isn't it? Do you need a calculator?

14 A. No, I would assume you've calculated it right
15 as a matter of fractions of months.

16 Q. All right. Now, Upsher-Smith entered earlier
17 than the chronological halfway point of this remaining
18 months period, did it not?

19 A. Yes.

20 Q. All right. Now, the only difference between
21 this exhibit and what was actually done in this case
22 was there are a few extra days earlier than July 1,
23 1997; namely, the date of the June 17, 1997 agreement,
24 about 13 days, right?

25 A. In terms of chronology, I think that's right,

1 although at the other end, too.

2 Q. Right, and at the other end --

3 A. Just in terms of chronology, yes.

4 Q. -- at the other end, sir, instead of September
5 1, 2006, it's actually September 5, 2006. Isn't that
6 correct?

7 A. Yes.

8 Q. That's the expiration date of the '743 patent
9 that Schering held on the microencapsulation technology
10 that's relevant to this case, correct, sir?

11 A. That's my understanding.

12 Q. All right, sir. Now, you had testified on
13 direct, you had your three pies. The top pie was
14 monopoly, was it not?

15 A. Yes.

16 Q. And you contend that Schering-Plough had a
17 monopoly in 1995, correct?

18 A. Yes.

19 Q. That's a monopoly of K-Dur 20 in the market of
20 20 mEq tablets. That's your market, right?

21 A. Or in capsules, yes.

22 Q. All right. And that was the state of affairs
23 up until September 1, 2001 in your view, correct, sir?

24 A. Yes, that's right.

25 Q. Now, if Upsher-Smith had lost its litigation,

1 isn't it correct, sir, that the monopoly pie would
2 continue and it would exist right now, there would be a
3 monopoly in the Schering-Plough product?

4 A. Yes, if they had lost their litigation. I'm
5 abstracting away from the -- from ESI, but as far as
6 Upsher goes, that's right.

7 Q. Now, you talk a lot in terms of percentages,
8 you know, the expectation of this or that, but there's
9 a percentage that consumers would live in your view
10 under monopoly all the way out to 2006. Isn't that
11 correct?

12 A. If Upsher -- if Upsher were not to enter and
13 had lost the case, yes.

14 Q. What if Upsher-Smith had abandoned its case, in
15 that case, under that assumption, it may continue out
16 all the way to 2006. Is that correct?

17 A. Yes, similarly.

18 Q. Now, you presented on your direct a calculation
19 of delay that you've made in this case. Is that
20 correct?

21 A. Yes.

22 MR. KADES: Objection, Your Honor. I don't
23 think he testified as to the length of delay in his
24 direct.

25 JUDGE CHAPPELL: The problem you have here, Mr.

1 Kades, is the witness just said under oath "yes" when
2 asked that question, so I am going to overrule it.

3 BY MR. GIDLEY:

4 Q. Professor Bresnahan, I heard something about
5 eight months in your direct testimony. Could you very
6 succinctly tell me what your eight months relates to as
7 it pertains to this case?

8 A. I don't recall whether I said it on my direct
9 testimony. There is -- it is in my report. I
10 calculate a range of delay periods. The eight months
11 comes from the assumption that Upsher-Smith had all the
12 bargaining power in negotiating with Schering and was
13 -- and that Schering was -- accepted a take it or
14 leave it offer. So, that's the bottom of it.

15 Q. And one of the calculations in your report is
16 for eight months, approximately 8.1 months is my
17 recollection. Do you recall that in your report?

18 A. Yes, that's the one I was just describing.

19 MR. GIDLEY: Permission to approach, Your
20 Honor?

21 JUDGE CHAPPELL: You may.

22 (USX Exhibit Number 1012 was marked for
23 identification.)

24 BY MR. GIDLEY:

25 Q. Professor Bresnahan, you've been handed an

1 exhibit for identification purposes which we will
2 designate USX 1012. Do you see that?

3 A. Yes. I don't see the 1012.

4 Q. We've got it on the copy under the ELMO. I'm
5 happy to give you that if you need the exhibit
6 reference.

7 A. No, no. No, it seems to be the same.

8 Q. Sir, the settlement that was entered into in
9 this case as a matter of chronology took 60 months off
10 the '743 patent. Do you see the green line and the
11 numbers 0 and 60?

12 A. Yes. I don't know if it took 60 months. I
13 mean, it permitted entry 60 months before the
14 expiration of the patent.

15 Q. All right. In fact, there's actually a little
16 more, there's five days more than 60 months, but in
17 round numbers, it took approximately 60 months off the
18 '743 patent, did it not?

19 A. Yes.

20 Q. Now, as a matter of chronology, just so I can
21 understand your report, you've got this calculation of
22 an eight or 8.1-month delay point, and I've plotted
23 that as "8?" On the green line. Do you see that in
24 Exhibit 1012?

25 A. I do.

1 Q. Now, if that calculation were the delay that
2 harmed consumers, that would be basically an
3 eight-month delay. Do you know what percentage out of
4 110 months eight months represents?

5 A. No. It's -- I haven't had occasion to make
6 that calculation, but it must be a little over -- a
7 little under 8 percent.

8 Q. My calculator says 7.3 percent. Does that
9 sound about right or would you like to see the
10 calculator?

11 A. No, that sounds about right.

12 Q. All right, sir. Now, you said that in your
13 report you have another date that's a little bit
14 earlier, do you not?

15 A. Yes.

16 Q. And what's that date of potential delay that
17 the agreement may have caused in your view?

18 A. At -- well, under the other extreme assumption
19 about the bargaining, which is a take it or leave it
20 offer the other way, it's back to the beginning.

21 MR. GIDLEY: Permission to approach, Your
22 Honor?

23 JUDGE CHAPPELL: You may.

24 BY MR. GIDLEY:

25 Q. Professor Bresnahan, I've just handed you what

1 we will mark for the record, for identification
2 purposes, USX 1013.

3 (USX Exhibit Number 1013 was marked for
4 identification.)

5 BY MR. GIDLEY:

6 Q. This is a slide entitled Remaining Months for
7 '743 Patent (with Bresnahan Delay Calculation). Do you
8 see that chart, sir?

9 A. I do.

10 Q. And the 8 and the 48 months on the green line,
11 have we properly calculated them off of the base date
12 of September 1, 2001?

13 A. I believe that's right.

14 Q. In other words, your calculation starts on the
15 premise that you want to examine delay that you say
16 consumers got hurt because a deal could have been
17 struck earlier. Is that correct?

18 A. Or -- or the expectation of litigation
19 outcomes by the parties could have been earlier, as
20 well.

21 Q. There's no record evidence that Schering-Plough
22 was willing to settle the '743 infringement suit any
23 earlier than September 1, 2001, is there, sir?

24 A. No, I have not seen them say that.

25 Q. And if I were to calculate 8.1 months off of

1 September 1, 2001, my estimate of where that would land
2 on the calendar would be approximately December 27th,
3 2000. Is that approximately where you'd put it in
4 terms of calendar?

5 A. At the end of 2000, yes.

6 Q. Right. And we have eight whole months in the
7 year of 2001, and we have a few days into 2000,
8 correct, sir?

9 A. Sounds right.

10 Q. And as you sit here today, there's no record
11 evidence that Schering-Plough was willing to settle on
12 or about December 27th, the year 2000 its '743
13 infringement suit with an entry date as of that date,
14 is there, sir?

15 A. No, they have -- they never said they were
16 willing to settle at that date.

17 Q. All right, sir. Now, the other extreme
18 calculation you have is this 48-month calculation,
19 which according to my math would take off approximately
20 108 months out of the approximately 110 months of the
21 entire remaining life, chronologically, of the '743
22 patent. Isn't that the case?

23 A. That's right.

24 Q. All right, sir. As a matter of bargaining
25 theory, doesn't that seem like a bit of an extreme

1 assumption, that in a lawsuit that's going strong in
2 late June of 1997, that Schering-Plough would ever be
3 willing to settle the case for an August 1 or a
4 September 1, 1997 result? Doesn't that seem a bit
5 extreme to you, sir?

6 A. Yes, I think both of the extremes are the
7 extremes of bargaining theory, that's right.

8 Q. All right. And just as a matter of what the
9 Schering-Plough negotiator might say, wouldn't the
10 Schering-Plough negotiator point out that at this point
11 in time, June of 1997, my client, Upsher-Smith, did not
12 have a microencapsulated product that had been
13 approved, had received final approval of the FDA at
14 this time, had it?

15 A. That's correct.

16 Q. And when, in fact, did my client, Upsher-Smith,
17 get that final approval from the FDA to market its Klor
18 Con M20 product?

19 A. Some years later.

20 Q. All right. How about November 1998, does that
21 sound about right?

22 A. That sounds plausible, yeah.

23 Q. All right. Well, that would be quite a few
24 months into this range of 40 months that you've got
25 here, correct?

1 A. Yes.

2 Q. All right. Now, the difference between 8 and
3 48 is how many months?

4 A. Forty.

5 Q. 4-0?

6 A. Yes.

7 Q. All right, sir. Now, in terms of the
8 litigation, have you modeled how long Schering-Plough
9 could have delayed or strung out the litigation with
10 appeals, petitions for on en banc hearing and the like
11 in the underlying '743 patent infringement suit?

12 A. No, I have not made a model of that.

13 Q. The settlement in June of 1997 was entered into
14 on the eve of trial. Isn't that correct?

15 A. Yes, that's my understanding.

16 Q. Do you have any idea how many witnesses were
17 expected to be called in the trial, the patent
18 infringement suit?

19 A. No, I don't.

20 Q. Do you have any idea how long the trial itself
21 was estimated to last?

22 A. Only from the -- only from the documents
23 reflecting potential entry dates I referred to earlier.

24 Q. What's your understanding based on for the
25 trial length?

1 A. The -- the nearest term scenario was of entry
2 in the summer. So, I infer that -- and it says after
3 trial, so I infer that the trial length was shorter
4 than that.

5 Q. Oh, I'm sorry, and in your last answer, you're
6 referring to these projections of potential generic
7 entry that were prepared by other people at
8 Upsher-Smith? Is that what you're relying on?

9 A. Yes.

10 Q. Do you have any idea sitting here today whether
11 those people were familiar with patent infringement
12 litigation?

13 A. No, not they themselves.

14 Q. If the people who prepared those projections
15 weren't familiar with the litigation, then their
16 estimates could be wrong if, in fact, it would take
17 longer for the litigation to conclude, could they not
18 be?

19 A. Yes, they -- their estimates could be wrong.

20 Q. Have you studied -- did you -- if you -- in
21 connection with this delay calculation, have you
22 studied the length of time that it would take to ramp
23 up manufacturing and distribution for the Klor Con M20
24 product?

25 A. Only in the -- only in examining the time line

1 documents and similar documents.

2 Q. Now, you testified on direct that certainty
3 doesn't have a value. Did I get that right?

4 A. No.

5 Q. Well, what did you say about certainty, because
6 it certainly confused me.

7 A. I'm not sure what I said about certainty. What
8 topic are you thinking of?

9 Q. I'm talking about the reasons for the
10 pro-competitive justifications for the June 1997
11 agreement, and one of the things that the June 1997
12 agreement would provide Upsher-Smith is a date certain
13 for the introduction of the Klor Con M20 product. Is
14 that not correct?

15 A. That is correct.

16 Q. And if I understood your direct testimony, you
17 didn't give much weight to that pro-competitive
18 justification. Is that correct?

19 A. No, I now understand what you mean. The
20 certainty itself I think is not in and of itself a
21 benefit.

22 Q. Now, have you studied at all the impact of
23 certainty or uncertainty on business planning decisions
24 such as capital investments in connection with this
25 case?

1 A. No, not in connection with this case.

2 Q. And we won't find that in your report, will we?

3 A. No, we won't.

4 Q. All right. Do you think --

5 JUDGE CHAPPELL: Mr. Gidley, we're approaching
6 12:30. Is this a good breaking point?

7 MR. GIDLEY: This is a fine breaking point,
8 Your Honor.

9 JUDGE CHAPPELL: Let's take a luncheon recess.
10 We'll reconvene at 1:30. We're in recess.

11 (Whereupon, at 12:30 p.m., a lunch recess was
12 taken.)

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1 AFTERNOON SESSION

2 (1:30 p.m.)

3 JUDGE CHAPPELL: Back on the record, docket
4 9297.

5 You may continue, Mr. Gidley.

6 MR. GIDLEY: Very good, Your Honor.

7 BY MR. GIDLEY:

8 Q. Professor Bresnahan, I want to go back to a
9 topic we touched on earlier, which was the discussion
10 of sunk costs, and I would ask you first, sir, if you
11 could define the concept of opportunity costs as
12 economists use that term.

13 A. The opportunity cost of the -- of an action is
14 -- it's total cost including what you give up by
15 not -- by not taking an alternative action.

16 Q. And specifically with reference to a
17 corporation such as Upsher-Smith, if a corporation
18 spends money on one activity, it may trade off or have
19 an opportunity cost against another activity, might it
20 not?

21 A. Yes, that's right.

22 Q. All right. And with reference to the patent
23 infringement litigation, sir, do you know how much had
24 been spent by Upsher-Smith in, you know, round numbers
25 by June of 1997 in the infringement litigation?

1 A. I don't recall. I believe I -- that's in my
2 report.

3 Q. All right. Well, would a figure of \$2.7 or
4 \$2.8 million surprise you as the amount spent by
5 Upsher-Smith in the '743 litigation?

6 A. No.

7 Q. Now, sir, that money, that \$2.7 or \$2.8
8 million, is not money that Upsher-Smith had been
9 spending on marketing its other pharmaceutical
10 products, correct?

11 A. You mean money they spent on the litigation?

12 Q. Yes, to June of 1997.

13 A. That's correct.

14 Q. And isn't it the case that that money also
15 wasn't available for drug R&D that was spent on the
16 litigation? Isn't that correct?

17 A. That's correct.

18 Q. And in that sense, sir, the litigation
19 expenditures represent that opportunity cost to the
20 managers of Upsher-Smith versus other uses for that
21 investment or that money.

22 A. I'm sorry, I just don't understand that.

23 Q. Well, sir, if we're looking at -- you don't
24 contend that Upsher-Smith had unlimited resources, do
25 you?

1 A. No.

2 Q. So, the Upsher-Smith managers had to husband
3 the resources and capital of the Upsher-Smith
4 corporation. Isn't that a basic concept?

5 A. Well, they don't want to spend resources
6 wastefully.

7 Q. And in general, they should be looking for the
8 highest and best use of their resources, correct?

9 A. Yes, that's what -- that's what a manager
10 should do.

11 Q. And monies that are spent on litigation can't
12 at the same time be spent on R&D for new pharmaceutical
13 products, can they, sir?

14 A. That's correct.

15 Q. Now, sir, didn't the litigation expense for
16 Upsher-Smith also represent a sunk cost to the
17 litigation in the sense that once the money is spent,
18 what Upsher-Smith has left over is a stack of legal
19 briefs and pleadings with very limited, if any, reuse
20 value within Upsher-Smith? Isn't that correct?

21 A. Well, unless it leads to a -- an outcome. I
22 mean, it's sunk to the hopes of winning the litigation
23 or getting a settlement I guess I would say.

24 Q. Right, but isn't it the case that in economics,
25 the Upsher-Smith managers should be constantly

1 re-evaluating the use of capital on a daily or weekly
2 or monthly basis so that they're putting their capital
3 to the best and highest use? Isn't that correct?

4 A. I'm not sure about the frequency, but the
5 principle is right.

6 Q. And just because \$2.8 million has been spent,
7 that's not an economic argument to -- an economics
8 argument to spend another million or two on the
9 litigation, is it, sir?

10 A. No, neither for nor against.

11 Q. The money that's already been spent is water
12 under the bridge, isn't it, from an economics
13 perspective?

14 A. That's right.

15 Q. I want to go back to the topic of the time
16 line, and I now want to direct your attention to this
17 concept of the Hatch-Waxman 180 days exclusivity
18 period.

19 A. Okay.

20 Q. Okay. Let's put back up on the screen USX
21 1011. Now, as a matter of just pure arithmetic, if we
22 take 180 days, that's six chronological months,
23 correct?

24 A. Yeah, around.

25 Q. In round terms.

1 A. Around.

2 Q. All right. And we were looking at our
3 approximate time line of 110 months earlier today,
4 weren't we, sir?

5 A. Ah, yes.

6 Q. And six months out of the 110 months is
7 approximately 5, 5 and a half percent, isn't it, sir?

8 A. That sounds right.

9 Q. All right, and I have got a calculator up here
10 if you would like to compute it yourself.

11 A. No, thanks.

12 Q. Now, sir, as you sit here today, you don't know
13 of any products that were blocked from entering the
14 market due to Upsher-Smith's settlement agreement with
15 Schering under the 180-day so-called exclusivity
16 period. Isn't that correct?

17 A. That's correct.

18 Q. Now, you're not an expert on FDA law, are you,
19 sir?

20 A. No, I am not.

21 Q. And you're not an expert in construing or
22 interpreting the Hatch-Waxman Act, are you, sir?

23 A. No, I am not.

24 Q. Now, nowhere in your report, your August
25 report, do you indicate that the 180-day marketing

1 exclusivity was ever discussed during the settlement
2 negotiations between Schering and Upsher-Smith. Isn't
3 that correct?

4 A. I think that's correct, too.

5 Q. And you didn't reference that in your direct
6 testimony in this courtroom, did you, sir?

7 A. No, I think not.

8 Q. And are you aware as you sit here of any
9 discussions of the 180-day exclusivity period actually
10 occurring prior to the entry of the June 17, 1997
11 agreement?

12 A. I'm sorry, I got -- I tripped over "actually
13 occurring." What was the question?

14 Q. What I'm asking about actually --

15 A. What was actually occurring, the 180-day
16 settlement or the time line being started before that?

17 Q. Let me ask a new question.

18 A. Okay.

19 Q. As far as you're concerned, based on an
20 extensive review of the documents, you have no evidence
21 that the Schering and Upsher managers and negotiators
22 ever actually discussed the 180-day exclusivity period
23 that now everybody has been talking about. Isn't that
24 correct, sir?

25 A. That's correct, I saw no reference to that.

1 Q. And moreover, you've reviewed the settlement
2 agreement, the June 17, 1997 settlement agreement. Is
3 that right?

4 A. I have.

5 Q. All right. And in the text of that agreement,
6 is there any reference whatsoever to a 180-day
7 exclusivity period?

8 A. I'm not sure.

9 Q. Are you aware of any reference to the
10 Hatch-Waxman Act in that agreement, sir?

11 A. No, I'm not sure of a -- of a reference to the
12 Act either.

13 Q. All right, let's take a look at the agreement,
14 if I could direct your attention to the blue book, the
15 cross examination exhibits, Professor.

16 A. Yes.

17 Q. Could you spend a few minutes refamiliarizing
18 yourself with the document found at tab 5, which is CX
19 348, the June 17, 1997 agreement between Schering
20 Corporation and Upsher-Smith Laboratories.

21 A. Yes. I'm sorry, should I read it again or what
22 would you -- what do you --

23 Q. Skim it, read it, whatever it takes to
24 determine whether there's any reference in this
25 agreement to the 180-day exclusivity period or to the

1 Hatch-Waxman Act.

2 A. (Document review.) I don't see one.

3 Q. And just so our record is clear, you don't see
4 a reference to 180-day exclusivity period. Is that
5 correct, sir?

6 A. Yes.

7 Q. And you don't see any reference in the June 17,
8 1997 agreement to the Hatch-Waxman Act, do you, sir?

9 A. No.

10 Q. And I want to make sure I ask this question, in
11 your review of the documents in this case, you didn't
12 find any correspondence or memos dated on or about or
13 prior to June 17, 1997 discussing the exclusivity
14 period or the Hatch-Waxman Act in the files of either
15 Upsher-Smith or Schering-Plough, did you?

16 A. Well, I'm sure there are references to -- at
17 least indirect references to the Hatch-Waxman Act,
18 because there are references to Upsher's ANDA, but I
19 don't think -- I don't recall written references to
20 the 180 days.

21 Q. Sir, in the correspondence and memos of
22 Upsher-Smith, you're not aware of any reference to the
23 180-day exclusivity period which is a provision of the
24 Hatch-Waxman Act. Isn't that correct?

25 A. Yes, it's a provision, as I understand it, and

1 also yes, I'm not aware of any such reference.

2 Q. In the Upsher-Smith documents.

3 A. Yes.

4 Q. Now, for Schering-Plough, you're not aware of
5 any reference prior to June 17, 1997 in the
6 Schering-Plough documents of a 180-day exclusivity
7 period, are you, sir?

8 A. No, I'm not.

9 Q. And you're not aware of any reference in the
10 Schering-Plough documents of the Hatch-Waxman Act as it
11 relates to some exclusivity period such as the 180 days
12 in the Schering-Plough documents prior to June 17,
13 1997.

14 A. I'm sorry, that one was pretty complicated.

15 Q. I just want to understand, are you aware of any
16 reference to the Hatch-Waxman Act in reference to the
17 June 17 agreement being contained in correspondence or
18 memos found at Schering-Plough before the agreement was
19 signed by both parties?

20 A. Well, again, reference to the ANDA of Upsher,
21 which I believe is also a reference to the Act, but not
22 to the 180 days, if that's what your question is.

23 Q. Let's set aside the ANDA.

24 A. Okay.

25 Q. The ANDA is the abbreviated new drug

1 application. Is that correct?

2 A. Yes.

3 Q. Let's set aside the ANDA itself.

4 A. Okay.

5 Q. In terms of the function of the Act to exclude
6 competition for the 180 days or six months after the
7 introduction of a first filer generic, is there any
8 reference to that concept that you found in
9 correspondence or memos of the Schering-Plough
10 Corporation?

11 A. No, not that I recall.

12 Q. I'd like to direct your attention to your
13 report, Professor. Can I direct your attention to page
14 22?

15 And Your Honor, that's CX 751, the Bresnahan
16 report from August of 2001.

17 Are you at page 22?

18 A. I am.

19 Q. At the top of the page, above the Bresnahan
20 test is a discussion of the 180-day issue, correct?

21 A. Yes, yes.

22 Q. Towards the bottom of that section, in the
23 paragraph that begins, "The same proposition holds,"
24 are you on that paragraph, the third paragraph?

25 A. Yes.

1 Q. I'd like to direct your attention to the final
2 two sentences of that paragraph. "If the probability
3 that the 180 day exclusivity period becomes a reality
4 the third party potential entrant is bottlenecked.
5 Thus, the harm to competition under a probability of
6 the 180 day exclusivity provision is equal to that
7 probability times the harm to competition under a
8 certainty of the provision."

9 Do you see that?

10 A. I do.

11 Q. Is it your testimony that anyone at
12 Schering-Plough had that thought in those two
13 sentences?

14 A. I do not know if anyone at Schering had that
15 thought.

16 Q. How about at Upsher-Smith, is it your testimony
17 that anyone at Upsher-Smith had the thought contained
18 in those two sentences prior to signing the June 17,
19 1997 agreement?

20 A. I don't know that they did.

21 MR. GIDLEY: Permission to approach, Your
22 Honor?

23 JUDGE CHAPPELL: You may.

24 BY MR. GIDLEY:

25 Q. Professor Bresnahan, I'm handing you an excerpt

1 from your report, your Appendix A17. For
2 identification purposes, we'll go ahead and mark it as
3 a USX, but I'm just looking at page A17 of your report,
4 which is already a CX .

5 (USX Exhibit Number 1014 was marked for
6 identification.)

7 BY MR. GIDLEY:

8 Q. Are you looking at Appendix A17?

9 A. I am.

10 Q. Now, Appendix A17 appears to be a time line of
11 various regulatory events. Do you see that?

12 A. Yes, regulatory and other events.

13 Q. All right. And is this a document you prepared
14 or did someone else prepare this document?

15 A. This is a document which was prepared for me by
16 folks at the FTC.

17 Q. Now, this document was attached to your August
18 15, 2001 report. Is that correct?

19 A. Yes.

20 Q. And you included it in the report because you
21 thought it would help the reader understand your
22 analysis. Is that correct?

23 A. Yes.

24 Q. And at the time you submitted your August 15
25 report, you thought it was correct. Is that the case?

1 A. Yes.

2 Q. Now, sir, I direct your attention to the
3 heading that says, "April-02." Is that the way -- am
4 I reading that properly? "A P R 0 2," is that April
5 2002?

6 A. Yes.

7 Q. And it says, "Earliest Date for a 2nd
8 independent generic to enter; based upon the status of
9 FDA law, Mova, M O V A, Granutec, G R A N U T E C, and
10 Upsher settlement."

11 Do you see that?

12 A. I do.

13 Q. And this is a calculation or purports to be a
14 calculation of the 180-day exclusivity period, does it
15 not?

16 A. Yes.

17 Q. And in fact, it's inaccurate, is it not?

18 A. Yes, it's off by a month as I understand it.

19 Q. When does the 180-day exclusivity period
20 actually expire? What's the last day?

21 A. I'm not sure what the exact day is. It would
22 be about six months after September 1st, 2001.

23 Q. What's your best estimate sitting here today?

24 A. That would be March.

25 Q. All right.

1 Permission to approach, Your Honor?

2 JUDGE CHAPPELL: You may.

3 BY MR. GIDLEY:

4 Q. I have handed you what is a CX , Professor
5 Bresnahan, CX 1481, and it appears to be pages taken
6 off the Food and Drug Administration homepage.

7 Directing your attention I think to the fourth
8 page of the document, it reads, "Electronic Orange
9 Book."

10 Do you have that page?

11 A. I do.

12 Q. And it says -- this was printed off apparently
13 from an online web site, "Updated, December 21, 2001."

14 Do you see that?

15 A. I see that.

16 Q. And it apparently comes from the U.S.
17 Department of Health and Human Services, Public Health
18 Service, Food and Drug Administration, Center for Drug
19 Evaluation and Research, Office of Information
20 Technology, Division of Data Management and Services.

21 Do you see that?

22 A. Yes.

23 Q. And that agency maintains the Orange Book. Is
24 that correct?

25 A. I'm not sure if the Division of Data Management

1 and Services maintains it, but I understand the FDA
2 maintains it.

3 Q. Well, what is the Orange Book, sir, would you
4 let us know?

5 A. It's a list of drugs, and I believe in
6 particular it is the place one looks to see what
7 generics are rated for particular brand name drugs.

8 Q. I'd like to direct your attention to the second
9 to the last page of this document, which says at the
10 top, "Active Ingredient," and in all caps, "POTASSIUM
11 CHLORIDE."

12 Do you have that page?

13 A. I do.

14 Q. And it says, "Active Ingredient: POTASSIUM
15 CHLORIDE," and the third line, "Proprietary Name:
16 Klor-Con M20; Applicant: Upsher-Smith; Strength: 20
17 mEq."

18 Do you see that?

19 A. I do.

20 Q. And that's the Klor Con M20 product that we've
21 been discussing in this litigation. Isn't that
22 correct, sir?

23 A. I believe that's right.

24 Q. And the formal application number with the FDA
25 is 074726, is it not?

1 A. It says "application number" there, but I don't
2 -- I don't know what that means.

3 Q. Okay. You've never looked at this document
4 before, sir?

5 A. I have never looked at this page before.

6 Q. All right. Well, that's what the document
7 says, so why don't we turn the page and see if we can
8 make sense of it.

9 On the next page, the document says,
10 "Exclusivity Data: Appl No," that's A P P L, N O,
11 "074726."

12 Do you see that?

13 A. I do.

14 Q. That appears to tie directly back to the entry
15 on the prior page, which has the exact same number for
16 an application number. Does that seem like a fair
17 reading of this document?

18 A. Yes.

19 Q. All right. And it says, "Product Number:
20 001," and on the next page, "Prod No," P R O D, N O,
21 "001."

22 Do you see that?

23 A. I do.

24 Q. And this document from the online Orange Book
25 says, "Exclusivity Expiration, February 28, 2002."

1 Do you see that?

2 A. I do.

3 Q. All right. Is that your understanding now of
4 the expiration date for the Hatch-Waxman Act?

5 A. You mean for Klor Con M20?

6 Q. For Klor Con M20 for the 180-day exclusivity
7 period, yes, sir.

8 A. Yes.

9 Q. If I can direct your attention to the second to
10 last page again, do you see the line that says,
11 "Approval Date: NOV 20, 1998"?

12 Do you see that?

13 A. I do.

14 Q. And indeed, that's the final approval date for
15 Klor Con M20, is it not, sir?

16 A. I believe that's right.

17 Q. And isn't it the case in this industry that it
18 would be illegal under the various food and drug laws
19 of this country to market Klor Con M20 prior to that
20 date? Is that not correct?

21 A. Yes, if they didn't get approval until then,
22 they couldn't market it.

23 Q. And there are some sanctions that obtain when
24 one tries to market a drug prior to the regulated date.
25 Isn't that correct?

1 A. I presume so.

2 Q. Do you know what those sanctions are, sir?

3 A. No, not in detail.

4 Q. Now, your August 15 report was written some 15
5 or 16 days before the beginning of the September 1,
6 2001 date, that is the date provided for in the June
7 17, 1997 agreement, correct?

8 A. Yes.

9 Q. In other words, so, unlike the parties here,
10 your analysis wasn't done in June of 1997; you were
11 just a little bit over two weeks away from the launch
12 of Klor Con M20 under the terms of the June 17, 1997
13 agreement when you were writing your report. Isn't
14 that correct?

15 A. Yes, that's correct.

16 Q. And unlike the parties, you had free access to
17 the documents both from Schering and from Upsher-Smith.
18 Is that correct, sir?

19 A. I'm not sure what you mean.

20 Q. Do you have an awareness or an understanding
21 that documents were produced by Upsher-Smith in
22 connection with both the Part 2 investigation and in
23 the Part -- subsequent Part 3 litigation which is
24 where we are today? Do you have an understanding that
25 there was a document production?

1 A. I'm sorry, the labels -- I don't understand
2 the labels. I mean, what's Part 2, what's Part 3?

3 Q. Well, Part 2 is the investigation phase; Part 3
4 is this phase, the trial, the litigation.

5 A. Oh, of this matter?

6 Q. Yes.

7 A. I see.

8 Q. And Part 2 is the investigational hearings and
9 Part 3 is this proceeding, and I'm simply asking you,
10 you've seen a lot of documents with USL numbers, with
11 Bates numbers. Is that correct?

12 A. Yes.

13 Q. And you had access to those documents when you
14 were preparing your report, did you not?

15 A. That's correct.

16 Q. And you also had access to documents that had
17 something like an SP designation that came from
18 Schering's response, correct?

19 A. Yes.

20 Q. So far as you know, you had full access to
21 every document that had been produced by the parties to
22 the Federal Trade Commission when you prepared your
23 report, did you not?

24 A. Yes.

25 Q. And you also had access to investigational

1 hearing transcripts and depositions, did you not?

2 A. Yes.

3 Q. So, there were sworn statements, both in the IH
4 phase and in the Part 3 phase, that you were able to
5 see. For instance, I'll give you an example. You
6 cited I think Mr. Driscoll's transcript, and I think
7 earlier we had another transcript. There are certain
8 witnesses in this case that you saw their deposition
9 transcript, correct?

10 A. That's true.

11 Q. And you had access to all of that material in
12 writing your report, correct, sir?

13 A. Yes.

14 Q. Sir, we talked earlier in connection with your
15 exhibit about Warrick which came onto the market on or
16 about September 1, 2001. Is that correct?

17 A. Yes.

18 Q. And Warrick came in at a lower price than the
19 K-Dur 20 on or about September 1, 2001. Is that
20 correct?

21 A. Yes.

22 Q. All right. And Upsher-Smith also introduced a
23 drug, correct, in September 1, 2001, on or about?

24 A. On or about, yeah.

25 Q. And that was the Klor Con M20 product?

1 A. Yes.

2 Q. And sir, as we sit here today, do you know
3 whether there's any other generic potassium chloride 20
4 mEq tablet that's being sold and marketed in the United
5 States during this exclusivity period, which will
6 expire February 28th, 2002?

7 A. No, I don't.

8 MR. GIDLEY: Permission to approach, Your
9 Honor?

10 JUDGE CHAPPELL: Okay.

11 BY MR. GIDLEY:

12 Q. Professor Bresnahan, I have handed you both a
13 bottle of tablets and a photocopy of the label just as
14 a demonstrative exhibit, which we will label USX 1015.

15 (USX Exhibit Number 1015 was marked for
16 identification.)

17 BY MR. GIDLEY:

18 Q. This is a label of a product from a company
19 called Qualitest. Do you see that bottle and that
20 label?

21 A. I do.

22 Q. Are you familiar with Qualitest?

23 A. I am not.

24 Q. Do you know whether Qualitest has entered into
25 a licensing agreement with Upsher-Smith?

1 A. I don't.

2 Q. Do you know the date of that agreement?

3 A. I don't know of that agreement.

4 Q. Do you know whether Qualitest is, in fact,
5 today able to sell a generic version of potassium
6 chloride in 10 mEq and in other quantity sizes?

7 A. I don't.

8 Q. Do you know whether they can sell 20 mEq?

9 A. I don't.

10 Q. The label I've handed you is 10 mEq, but as you
11 sit here today, you don't know whether they do 20 mEq.
12 Is that correct?

13 A. No, I don't know about Qualitest.

14 Q. Now, by your own testimony, as of September 1,
15 2001, if I understand it, we have Warrick and
16 Schering-Plough's K-Dur 20 and Upsher-Smith's Klor Con
17 M20, correct?

18 A. Yes.

19 Q. So, we have three 20 mEq products that are
20 being sold today in part due to the June 17, 1997
21 agreement. Isn't that correct?

22 A. Well, under the agreement, yes.

23 Q. All right, pursuant to the terms of the
24 agreement. Isn't that correct?

25 A. Yes.

1 Q. I want to go back now to the time line exhibit,
2 Professor Bresnahan.

3 A. Yes, which one?

4 Q. Let me put it up and I'll read the exhibit
5 number back into the record.

6 Sir, I have put back on the ELMO USX 1011
7 entitled Remaining Months for the '743 Patent, and it's
8 a document with a red time line. Let's go ahead and
9 skip to USX 1013. That's the version of this chart
10 that contains your delay calculation?

11 A. This one (indicating)?

12 Q. Yes.

13 A. Thank you.

14 Q. Now, as I understand your report, you've got a
15 40-month window between two extremes, one of eight
16 months of delay and one of 48 months of delay. Is that
17 correct?

18 A. Yes.

19 Q. That's approximately 40 months, correct, the
20 difference?

21 A. Yes.

22 Q. And within that range, based on the work in
23 your report, you're not able to pin down what the date
24 should have been. Is that correct?

25 A. That's correct.

1 Q. In fact, you say in your report at page 32, "We
2 could not precisely measure the amount of delay and the
3 expected date of entry, because we do not know exactly
4 how Upsher-Smith and Schering divided the additional
5 monopoly profit from that delay."

6 Is that not correct?

7 A. That's correct.

8 Q. Now, as I understood your report -- and let me
9 just confirm this, Professor Bresnahan, I'll put this
10 on the ELMO. Are you able to see that, sir?

11 A. Yes.

12 Q. I believe this slide was used by Mr. Nields in
13 connection with his opening statement. Were you here
14 for that?

15 A. Yes, I was here for the opening statements.

16 Q. And what he did was he quoted a phrase from the
17 complaint counsel's trial brief, and I just want to ask
18 you a couple of questions to see if I understand your
19 opinion in this case.

20 "This case does not challenge the settlement of
21 patent disputes by an agreement on a date of entry,
22 standing alone."

23 Do you see that part of the sentence?

24 A. I do.

25 Q. Now, in June of 1997, had my client,

1 Upsher-Smith, and Schering-Plough simply entered into
2 an agreement as to the entry date for the Klor Con M20
3 product as a settlement of the '743 litigation with no
4 side licenses, just a negotiation over the entry date,
5 you would -- the Bresnahan test or rule would not
6 apply, would it, sir?

7 A. Well, it would apply, but it -- but the third
8 prong would be failed -- would fail, if you will.

9 Q. And such an agreement, therefore, would not be
10 anti-competitive under the Bresnahan rule, correct?

11 A. Under my test, yes.

12 Q. It would not -- it would not fail the
13 Bresnahan test, right?

14 A. Yes, it would not be anti-competitive.

15 Q. All right, sir. Now, similarly, had
16 Upsher-Smith and Schering-Plough entered into an
17 agreement that contained a side deal at fair market
18 value, same negotiation, they negotiate entry date and
19 then they have a side licensing deal, and it contains
20 fair market value consideration being exchanged between
21 the parties, that would not flunk the Bresnahan test.
22 That would not be anti-competitive according to you.
23 Is that correct?

24 A. That's right.

25 Q. All right. So, you don't have a problem with

1 side agreements, as such; you want to make sure there's
2 no net positive value flowing to the generic firm. Is
3 that correct?

4 A. That's -- that's my test, yes.

5 Q. All right. And the idea of two firms locked in
6 a patent infringement suit sitting down to settle that
7 suit and hammering out an entry date, that's not
8 something by itself that you object to under the
9 Bresnahan rule or test. Isn't that correct?

10 A. That's correct.

11 Q. Now, as you sit here today -- and I direct
12 your attention back to the time line. As you sit here
13 today, have you calculated the -- a single reasonable
14 entry date that if they had negotiated just simply on
15 entry date would have been the reasonable entry date
16 for this negotiation as of June 1997 within this
17 110-month window?

18 A. No, I have not calculated a single date. I
19 have my range here of dates.

20 Q. All right, sir. So, directing your attention
21 to the numbers 48 and 8, is it your testimony that if
22 the parties were to sit down and negotiate over entry
23 date, that the dates between the bars 48 and 8 would be
24 reasonable settlements under your Bresnahan test and
25 the formulas that you apply in your report?

1 A. I'm sorry, I misunderstood the question, I
2 think.

3 Q. Here's my question: I want to -- I'll just
4 recast it.

5 A. Thanks.

6 Q. I just want to understand whether or not, based
7 on the work that you've done, if there were simply a
8 negotiation between Upsher and Schering-Plough as to
9 the entry date, there's no side licenses --

10 A. Yes.

11 Q. -- there are no six drugs, based on your
12 report, do you have a single reasonable entry date or a
13 window within which any date they arrive at would not
14 be anti-competitive by your -- by your lines, by your
15 analysis?

16 A. No, I don't have a single date.

17 Q. Do you have a 40-month window of potential
18 dates? Is that your testimony?

19 A. The -- yes, of dates in which I infer if such
20 a settlement could have been reached, it would have
21 followed, though I don't know that it could have been
22 reached.

23 Q. I'd like to ask you a hypothetical question,
24 Doctor. Let's assume that there's no negotiation over
25 any of the side licenses, and we're back in June of

1 1997, same facts, litigants are going at it tooth and
2 nail. Are you with me so far? We are talking about
3 Upsher and Schering-Plough, June of 1997?

4 A. Part, yes. The part I didn't understand was
5 the "no negotiation."

6 Q. I'm getting to that.

7 A. Okay.

8 Q. They're in litigation, they're spending a lot
9 of money, we're in June of 1997.

10 A. Okay.

11 Q. Okay. Let's say they have the Bresnahan rule
12 in front of them, and they observe that there cannot be
13 a net positive payment or value sent over to
14 Upsher-Smith, correct?

15 A. Under that test.

16 Q. Let's just make the counterfactual assumption
17 that due to a time machine or something, they have got
18 your test in front of them, and they say under this
19 test we know we can't have a side licensing agreement,
20 because we just are concerned about whether or not we
21 are going to get fair market value, so let's not have
22 any side licensing agreement. Let's simply work out an
23 entry date.

24 Are you with me so far?

25 A. I'm with you so far.

1 Q. All right. They are not going to have anything
2 else exchanged. The agreement is going to be a
3 one-paragraph agreement, whatever it takes to just
4 simply document an entry date negotiation between
5 Upsher and Schering.

6 Are you with me so far?

7 A. I'm with you so far.

8 Q. All right. Now, if the parties agreed to a
9 date of March 2002 and there's no side deal, that
10 wouldn't technically violate the Bresnahan rule, would
11 it?

12 A. No, it would not.

13 Q. All right. So, is it your testimony that
14 that's an unreasonable settlement?

15 A. No, if they had agreed to such a date without a
16 payment, I would not think that that was an
17 unreasonable settlement. That's only in a
18 hypothetical, not in this court.

19 Q. I understand, I'm just trying to understand how
20 -- your testimony.

21 Let's say the date was a little farther back.
22 Let's just say they have an entry date negotiation, and
23 the date that they bargain for is November 2002. No
24 side license, no attorneys' fees, nothing else is
25 exchanged. Would that be --

1 JUDGE CHAPPELL: Mr. Gidley, hold on and let's
2 let the motorcade pass. I don't think anyone can hear
3 you, at least I can't.

4 Okay, I think they're in the distance. You may
5 proceed.

6 MR. GIDLEY: I'll wait one more minute. Now
7 I'm tuned in on the sirens.

8 BY MR. GIDLEY:

9 Q. Let me start my question over.

10 Professor Bresnahan, if the parties had the
11 Bresnahan rule or test in front of them back in June of
12 1997 and they concluded that it would be too risky to
13 have any licensing deal, because they don't want to
14 have a debate with anyone over fair market value, so
15 they set aside any side license. They go into a
16 conference room, and they hammer out, yelling,
17 screaming, all the other things that go into a
18 settlement, and they hammer out an entry date of
19 November 2002. There's no side license, there's no
20 side payment, there's no cash or any other value
21 flowing to Upsher-Smith. There's just an entry date of
22 November 2002.

23 Now, that wouldn't violate the Bresnahan rule.
24 Isn't that correct?

25 A. If there were no side payment, that wouldn't

1 violate my test.

2 Q. It would not be anti-competitive under the
3 Bresnahan test, such an agreement of November 2002,
4 correct?

5 A. Right, if they could somehow reach it.

6 Q. And that date, of course, is later than the
7 September 1, 2001 agreement that they actually hammered
8 out, isn't it, sir?

9 A. Yes, that's right.

10 Q. I'd like to change gears for a minute and talk
11 a little bit about marketing.

12 May I approach, Your Honor?

13 JUDGE CHAPPELL: Yes.

14 BY MR. GIDLEY:

15 Q. Professor Bresnahan --

16 JUDGE CHAPPELL: Mr. Gidley, I believe you
17 passed this one out a lot earlier, perhaps you never
18 referred to it.

19 MR. GIDLEY: I may not have referred to it,
20 Your Honor, but I'd like to now.

21 BY MR. GIDLEY:

22 Q. Professor Bresnahan, I direct your attention to
23 a memorandum from Ms. Denise Dolan of the Upsher-Smith
24 Company to Bob Coleman dated June 15, 1998, and it is
25 USX 498. Do you see that?

1 A. I do.

2 Q. Now, as of the date of this memo, June 15,
3 1998, directing your attention to the first bullet, the
4 Klor Con M20 product had not yet been approved by the
5 FDA. Isn't that correct?

6 A. Yes.

7 Q. In fact, Upsher-Smith had received a major
8 deficiency and responded to the FDA on November 7th,
9 1997, correct?

10 A. Yes.

11 Q. And as the next bullet recites, "The FDA has a
12 timetable to respond to deficiencies within 6 months -
13 that date would have been May 7, 1998." Then it goes
14 on to say, "We have not yet heard from the FDA."

15 Do you see that?

16 A. I see that.

17 Q. So, the FDA was going a little bit beyond its
18 six-month window it appears from that document, does it
19 not?

20 A. Yes.

21 Q. And the next bullet indicates that
22 Upsher-Smith's regulatory affairs department had been
23 calling the FDA, but as of the date of this memo,
24 hasn't yet received a response. Isn't that correct?

25 A. Yes.

1 Q. Two bullets down, it talks about how, "The --
2 Upsher-Smith could --" let me read that over.

3 "Upsher-Smith could market the M20 product upon FDA
4 approval after September 1, 2001," correct?

5 A. Yes.

6 Q. All right. And directing your attention now to
7 the marketing plan that Ms. Dolan was writing about --
8 skip down to the second set of bullets, if you would,
9 sir -- she writes, "It is imperative to maintain the
10 customer base for Klor-Con."

11 Do you see that?

12 A. I do.

13 Q. And when she's talking about Klor Con in this
14 time period, she's talking about the 8 and the 10
15 products, is she not?

16 A. That's my understanding.

17 Q. The 8 and 10 mEq products.

18 And she says in the final bullet on this page,
19 "We should continue to target K-Dur 10 and 20 pharmacy
20 customers with the Klor-Con 10 message."

21 Do you see that?

22 A. I do.

23 Q. All right, sir. So, at this point in time, at
24 least from Ms. Dolan's standpoint, she was recommending
25 that there be continued targeting of K-Dur 20 by Upsher

1 in its Klor Con 10 marketing, was she not?

2 A. Yes.

3 Q. And sir, is this document referred to in your
4 report or your end notes?

5 A. I don't think so.

6 Q. Directing your attention to the next page, the
7 paragraph that begins, "We."

8 A. Yes, yes.

9 Q. Are you there?

10 This is the document Bates numbered 6872 of USX
11 498. It says, "We have looked into purchasing the
12 physician data for K-Dur 20. We could buy this MD data
13 for approximately \$10,000 for 10,000 MD names - for a
14 one-time use."

15 Do you see that?

16 A. I do.

17 Q. And she actually goes on to debate whether it
18 would be premature or timely to buy that database. Do
19 you see that?

20 A. Yes.

21 Q. And is that a passage that you've read before
22 in your work in this case?

23 A. I don't recall it.

24 Q. But it's not referred to in your report. Isn't
25 that correct?

1 A. No.

2 Q. All right, sir. Professor Bresnahan, I'd like
3 to go back to the blue book of exhibits. That's this
4 book, sir.

5 A. Give me a moment.

6 Q. You bet.

7 A. Got it.

8 Q. Let me direct your attention, if I could, to
9 tab 5, CX 348. Do you see that?

10 A. Yes.

11 Q. Now, the way this document is organized, there
12 is three pages and then beginning on the page Bates
13 numbered USL 3186 is Exhibit A containing detailed
14 agreement terms. Do you see that?

15 A. I do.

16 Q. Now, earlier today we had a conversation about
17 the effects of Schering-Plough with its Warrick
18 Division or business unit introducing a generic version
19 of K-Dur 20 prior to September 1. Do you recall that
20 discussion?

21 A. I do.

22 Q. And in paragraph 3, the third sentence, and
23 I've got my pen on it, I don't know whether that helps
24 you, but again, it's "In the event," do you see that?

25 A. In the event (i) Schering grants --"

1 Q. Right. Skip the first clause.

2 A. Right.

3 Q. But in the second clause, "In the event that
4 Schering or its affiliates sells a generic version of
5 Key Pharmaceuticals, Inc.'s K-DUR 20 mEq tablet for
6 retail distribution (excluding sales to or on behalf of
7 members of managed care entities) then the
8 aforementioned license to Upsher-Smith shall become
9 effective on the date of the first commercial sale of
10 such generic K-DUR 20 mEq tablet in the U.S."

11 Do you see that?

12 A. Yes.

13 Q. And that's the provision you were referring to
14 earlier that could trigger an earlier sale by
15 Upsher-Smith of its Klor Con M20 product on the face of
16 the agreement. Isn't that correct?

17 A. Yes.

18 Q. So, in other words, if at any point Schering
19 had brought out Warrick, perhaps in response to another
20 company's drug, that first sale of a Warrick generic
21 potassium chloride 20 mEq would trigger the ability of
22 Upsher-Smith to at that point come onto the market,
23 correct?

24 A. Yes, that's my understanding.

25 Q. And if that didn't happen and if the first

1 clause didn't happen, then no matter what, Upsher-Smith
2 could enter as of September 1, 2001 under the terms of
3 this agreement. Isn't that correct?

4 A. Yes.

5 Q. Now, I believe you testified on direct that you
6 examined paragraph 11, that's two pages down, USL3188.
7 Do you see that?

8 A. Yes.

9 Q. And I think you referenced this consideration
10 language referencing paragraphs 1 through 10 and
11 concluded based on that reference that there must have
12 been a payment for delay. Was that your testimony on
13 direct?

14 A. I didn't understand the -- "that reference."

15 Q. I understood in direct that by staring at
16 paragraph 11, you were able to conclude that there was
17 a payment for delay in this case. Could you just
18 simply tell me what language in paragraph 11 you're
19 relying on?

20 A. Well, the -- the paragraph 11 links these
21 payments to things including paragraph 3, which sets
22 the entry date.

23 Q. And are you basing that based on the reference
24 in paragraph 11 to paragraphs 1 through 10 above?

25 A. Yes.

1 Q. Now, you have not attended law school. Is that
2 correct, Professor?

3 A. That is correct. Only one course.

4 Q. You have never studied the topic of contracts.
5 Is that correct?

6 A. That's correct, too.

7 Q. You have never studied the formalities of
8 consideration and the way consideration works in a
9 contract. Isn't that correct?

10 A. That's also correct.

11 Q. Directing your attention to paragraph (i),
12 which discusses, "An up-front royalty payment of 28
13 million dollars," do you see that?

14 A. I do.

15 Q. Do you see the word "royalty"?

16 A. Yes.

17 Q. Sir, isn't it true that the word "royalty" is a
18 common term in intellectual property licensing
19 agreements?

20 A. I'm sure that's right.

21 Q. And in fact, a royalty is a payment to someone
22 else who owns intellectual property in return for the
23 use of that intellectual property. Isn't that correct?

24 A. The word's often used to mean that, yes.

25 Q. All right. Is there any different meaning that

1 you ascribe to this agreement? Have you considered
2 this question before?

3 A. Yes.

4 Q. You've considered the meaning of the word
5 "royalty" in (i)?

6 A. Yes.

7 Q. What is the Bresnahan definition of "royalty"
8 in (i)?

9 A. I thought that it meant that the -- that
10 paragraph should read as if the payment were for the
11 licenses.

12 Q. That is, the licenses for the drugs that are
13 referenced in this case?

14 A. Yes.

15 Q. All right. The same with paragraph (ii) and
16 paragraph (iii), that the word "royalty" refers to a
17 payment for the license. Is that correct?

18 A. Yes.

19 Q. All right. Now, this agreement does contain
20 licenses, does it not?

21 A. It does.

22 Q. All right. May I direct your attention to the
23 prior page, paragraph 7. Paragraph 7 contains a
24 license flowing from Upsher-Smith to Schering-Plough
25 for the Niacor-SR product, does it not?

1 A. It does.

2 Q. And it's granted in three parts, is it not?

3 A. I'm not sure about the three parts.

4 Q. Well, let's take them one at a time. First,
5 "Schering-Plough Ltd. Shall have (i) an exclusive
6 license to make, have made, import, export, use, offer
7 for sale and sell Upsher-Smith's Niacor-SR product in
8 all countries other than Canada, the United States and
9 Mexico."

10 Do you see that?

11 A. Yes.

12 Q. All right. That's a license for
13 Schering-Plough to make that product in those
14 territories, is it not?

15 A. Yes.

16 Q. All right. And the second part of it is, "an
17 exclusive license in those same territories," meaning
18 all countries other than Canada, the United States and
19 Mexico, "under all patents, know-how and trade secrets
20 held by Upsher-Smith for the Niacor-SR product."

21 Isn't that correct?

22 A. Yes.

23 Q. So, in that language, Upsher-Smith is granting
24 its know-how, in short, to Schering-Plough, is it not?

25 A. Yes.

1 Q. And in the third part, there is a grant of
2 trademarks and trade dress and service marks from
3 Upsher-Smith to Schering-Plough, is there not?

4 A. Yes.

5 Q. All right, sir. Now, in addition, this
6 paragraph contains a supply agreement, does it not?

7 A. Yes.

8 Q. That is found in the last sentence of paragraph
9 7, is it not, sir?

10 A. That's where it's raised.

11 Q. "The SP Licensee shall have the option, in its
12 sole discretion, of purchasing all or a portion of its
13 supplies of Niacor-SR from Upsher-Smith at its cost of
14 goods, manufacturing such supplies itself, and/or
15 purchasing from a third party all or a portion of its
16 supplies of Niacor-SR."

17 Do you see that?

18 A. Yes.

19 Q. Now, that language produced -- the language
20 about Upsher-Smith producing at its cost of goods,
21 doesn't that grant value to Schering-Plough so that it
22 may call upon Upsher-Smith to produce the Niacor-SR
23 product?

24 A. Yes, I would -- I would think that this would
25 be of some value to Schering-Plough.

1 Q. All right. And this is a supply agreement. Is
2 that a fair characterization of this sentence?

3 A. That -- that part of it, yes.

4 Q. It -- it basically grants Schering-Plough an
5 ability to call upon Upsher-Smith to make the product.
6 Isn't that correct?

7 A. Yes.

8 Q. All right, sir. Now, in your report, the
9 report dated August 15, 2001, you've got some sections
10 that discuss the value of the Niacor-SR license, do you
11 not?

12 A. I do.

13 Q. I didn't see any express reference or attempted
14 valuation made on your part to calculate a value of the
15 Niacor-SR license as of June 17, 1997. Isn't that
16 correct?

17 A. That is correct.

18 Q. You haven't done a discounted cash flow
19 analysis of the prospects as of June 17, 1997 for the
20 value using economic methods for the Niacor-SR license
21 yourself, have you?

22 A. No, only -- only through my -- my economic
23 methods are the revealed preference and market tests I
24 talked about the other day. I haven't done a valuation
25 analysis.

1 Q. And you testified at your deposition that
2 economists do have economic valuation tools where they
3 can take a look at a stream of potential payments,
4 discount those payments and come up with a present
5 value, can they not?

6 A. Yes.

7 Q. But you haven't done that for the Niacor-SR and
8 the license contained in this agreement.

9 A. That's correct.

10 Q. And you similarly haven't created an economic
11 valuation that ascribes a number, a particular number,
12 to the supply agreement contained in paragraph 7. Is
13 that not correct?

14 A. That's also correct.

15 Q. Directing your attention to paragraph 8,
16 paragraph 8 grants a license to "have made, import,
17 export, use, offer for sale and sell Upsher-Smith's
18 Klor Con 8, Klor Con 10 and Klor Con M20 products in
19 all countries other than Canada, the United States and
20 Mexico."

21 Do you see that?

22 A. I do.

23 Q. Have you calculated the net present value as of
24 June 17, 1997 for that license flowing from
25 Upsher-Smith to Schering-Plough?

1 A. No, I have not done any valuation analysis of
2 that license.

3 Q. Is it your testimony that the expected value of
4 that license was absolutely zero as of June 17, 1997?

5 A. No.

6 Q. Do you believe it had some value?

7 A. It -- it -- yes, though I don't know how
8 large.

9 Q. All right. Sitting here today, you can't say
10 whether it's worth \$2 million, \$5 million or \$50
11 million. Isn't that correct?

12 A. I have not done a quantitative analysis of its
13 value.

14 Q. And similarly, with respect to Niacor-SR, you
15 haven't done your own quantified value as to whether
16 the Niacor-SR license contained in paragraph 7 is worth
17 \$10 million, \$15 million or \$50 million or more, have
18 you, sir?

19 A. I have not done a valuation of the -- of that
20 license, that's right.

21 Q. The Niacor-SR license, correct?

22 A. That's correct.

23 Q. Now, this provision of the June 17, 1997
24 agreement also contains a supply agreement, does it
25 not?

1 A. I'm sorry, which provision?

2 Q. I'm in paragraph 8, the final sentence.

3 A. Yes.

4 Q. "The SP Licensee shall have the option, in its
5 sole discretion, of purchasing all or a portion of its
6 supplies of the Klor Con products from Upsher-Smith at
7 its cost of goods."

8 Do you see that quote?

9 A. Yes.

10 Q. Again, that would permit Schering-Plough to
11 call upon Upsher-Smith to sell the product at
12 Upsher-Smith's cost of goods to Schering-Plough, would
13 it not?

14 A. That's -- yes.

15 Q. And that provision has some value as of June
16 17, 1997, does it not?

17 A. Yes.

18 Q. And is that something that you valued in your
19 report, your August 2001 report?

20 A. No, I have not done a valuation analysis.

21 Q. So, again, you don't know whether it's worth a
22 million dollars, \$500,000 or \$10 million. Is that
23 correct?

24 A. I have done no quantitative analysis of it.

25 Q. Directing your attention to paragraph 9,

1 paragraph 9 grants the Schering-Plough licensee, we
2 will just refer to them as Schering-Plough for the time
3 being, "an exclusive paid-up royalty free license to
4 make, have made, import, export, use, offer for sale
5 and sell Upsher-Smith's Prevalite product in all
6 countries other than Canada and Mexico (and in
7 different packaging in the United States)."

8 Do you see that?

9 A. I do.

10 Q. Sir, is it your testimony that this license had
11 absolutely zero value as of June 1997?

12 A. No.

13 Q. It had some positive value. Is that correct?

14 A. Yes.

15 Q. Sitting here today or in connection with your
16 August report, have you assigned a numeric value to the
17 Prevalite license that was granted by Upsher-Smith to
18 Schering-Plough?

19 A. No, I have not.

20 Q. And sitting here today, you don't know whether
21 that's worth \$2 million, \$5 million or \$20 million.
22 Isn't that correct?

23 A. I have made no quantitative assessment of it.

24 Q. Similarly, there's a supply agreement, is there
25 not, sir?

1 A. Yes.

2 Q. Can you point it out to me, sir?

3 A. Yes, it's towards the end of the paragraph.

4 Q. That's the sentence -- can you just read off
5 the sentence that contains the supply agreement?

6 A. Yes. "The SP Licensee shall have the option,
7 in its sole discretion, of (a) purchasing all or a
8 portion of its supplies of Prevalite from Upsher-Smith
9 at its cost of goods (fob Minneapolis) for countries
10 outside the U.S. or its cost of goods (fob Minneapolis)
11 plus thirty percent (30%) for the U.S.," and then the
12 rest of it just has the other options as before.

13 Q. All right. And that language means that for
14 sales outside the United States of Prevalite,
15 Upsher-Smith was in the position of potentially being
16 called upon by Schering-Plough to produce that product
17 at its cost of goods. Isn't that correct?

18 A. Yes, that's my understanding.

19 Q. And the granting of this right has some
20 positive value, does it not, sir?

21 A. Yes, I imagine so.

22 Q. And as you sit here today, that's not something
23 that you've modeled or put a dollar figure on. Isn't
24 that correct?

25 A. That's correct.

1 Q. You don't have a quantitative analysis of the
2 value of that supply agreement, do you?

3 A. That's correct.

4 Q. Directing your attention to paragraph 10,
5 paragraph 10 reads, "The Schering-Plough Licensee shall
6 have an exclusive paid-up royalty-free license to make,
7 have made, import, export, use, offer for sale and sell
8 Upsher-Smith's pentoxifylline product in all countries
9 other than Canada, the U.S. and Mexico. "

10 Do you see that?

11 A. I do.

12 Q. And that's a license that permits
13 Schering-Plough to sell pentoxifylline. Isn't that
14 correct?

15 A. Yes.

16 Q. And what is pentoxifylline?

17 A. I don't know. Another drug I imagine.

18 Q. All right. In addition to that license -- by
19 the way, as you sit here today, have you valued with a
20 quantitative figure, using economic methods, this
21 license contained in paragraph 10?

22 A. No, I have not valued this license.

23 Q. So, again, you can't tell me whether it's worth
24 \$2 million, \$10 million or some other number, can you,
25 sir?

1 A. No, not based on my valuation.

2 Q. And it's not your testimony that it's worth
3 zero. Is that correct?

4 A. That's correct.

5 Q. It's worth something above zero, correct?

6 A. Yes.

7 Q. Directing your attention to the last sentence,
8 there's a supply agreement contained in paragraph 10,
9 is there not?

10 A. Yes.

11 Q. Would you read it, please?

12 A. "The SP Licensee shall have the option, in its
13 sole discretion, of purchasing all or a portion of its
14 supplies of pentoxifylline from Upsher-Smith at its
15 cost of goods, manufacturing such supplies itself," et
16 cetera.

17 Q. And the way you read that, sir, is that, again,
18 Schering-Plough could call upon Upsher-Smith to produce
19 pentoxifylline for the benefit of Schering-Plough at
20 Upsher-Smith's cost of goods. Isn't that correct?

21 A. Yes, that's how I read it.

22 Q. And that could be a valuable right, couldn't
23 it, sir?

24 A. Yes, of some amount.

25 Q. And it's not your testimony that that right is

1 worth zero. Is that correct?

2 A. That's correct.

3 Q. And sitting here today, you haven't conducted
4 any type of economic valuation of that right. Is that
5 correct?

6 A. I have done no valuation of that right.

7 Q. Recapping paragraphs 7 through 10, which by my
8 count in four paragraphs discuss six pharmaceutical
9 products, you haven't put an economic valuation on the
10 bundle of the six products license -- that are
11 licensed there. Isn't that correct?

12 A. That's correct, I have not put -- I have not
13 attempted to value the bundle.

14 Q. Right. And in terms of the supply agreements
15 contained in paragraphs 7 through 10, you haven't
16 attempted to put a number on each or collectively the
17 production agreements and supply agreements that are
18 contained in those four paragraphs, have you, sir?

19 A. That's correct.

20 Q. Have you studied the history of negotiations
21 over which products would be included in the product
22 licenses that eventually became recorded in paragraphs
23 7 through 10?

24 A. I've read about the negotiations. I'm not sure
25 I'd say I'd studied the history of them.

1 Q. Do you know which was arrived at first, the
2 entry date or the products that would be licensed? Do
3 you know how that played out in the negotiations?

4 A. No.

5 Q. Would it surprise you to learn that the entry
6 date was hammered out first and that the products that
7 were licensed were handled and hammered out in a second
8 stage? Would that surprise you?

9 A. No, nor its opposite.

10 Q. All right. Well, did you consider whether or
11 not any other products were offered to Schering-Plough
12 in connection with settling the patent infringement
13 case?

14 A. I don't recall discussion of other products at
15 this time. I may have read something about it, but I
16 don't recall it.

17 Q. Have you ever heard of a drug called Pacerone?

18 A. I don't think so.

19 Q. Do you have any understanding as you sit here
20 today whether Pacerone was offered or discussed with
21 the Schering-Plough executives?

22 A. I don't recall that drug.

23 Q. Do you know how Pacerone has done subsequent to
24 June 1997?

25 A. No.

1 Q. Do you have an understanding or would it
2 surprise you to learn that Pacerone's been one of the
3 top three or four selling drugs from Upsher-Smith in
4 the last several years?

5 A. I have no understanding of it.

6 Q. If Pacerone had been offered and accepted in
7 this agreement and had performed very well, let's say
8 that it would have generated \$60 million net present
9 value in profits for Schering-Plough, that would meet
10 the Bresnahan test, would it not?

11 A. No, the -- the Bresnahan test is applied as of
12 the time of the expectation, so the later performance,
13 which if I understood your question right was the core
14 of it, is not what's important.

15 Q. Let me see if I can understand that. I believe
16 you testified earlier that the net present value of
17 these three payments, the \$28 million payment, the \$20
18 million payment and the \$12 million payment, was
19 approximately \$54.5 million. Isn't that correct?

20 A. That sounds right.

21 Q. All right. So, as of June 1997, that's one
22 measure we employ in looking at what the parties were
23 looking at, correct?

24 A. Yes.

25 Q. I mean, that's a -- that's an evaluation

1 constant, because we have an agreement that was inked
2 as of June 1997, and it does provide for these
3 payments, correct?

4 A. I'm not sure what you mean by "evaluation
5 constant."

6 Q. Well, I'm curious. Do you have an opinion on
7 whether or not these payments, the three payments, were
8 contingent or noncontingent? Is that something you've
9 studied or thought about?

10 A. Yes.

11 Q. You think they are noncontingent?

12 A. Yes, other than on approval by the Schering
13 board.

14 Q. And I take it, sir, you haven't gone out of
15 your way to read the contracts literature about
16 contracts that are performed over time such as
17 construction contracts and others that have progress
18 payments and constructive conditions of exchange. You
19 haven't steeped yourself in that literature. Is that
20 correct?

21 A. That's correct.

22 Q. All right. So, your opinion as to whether or
23 not this is contingent or noncontingent is based simply
24 on your application of the English language to the
25 language here in this agreement?

1 A. Insofar as it's my own, yes.

2 Q. All right. Let's take that \$54 million, \$54.5
3 million for the purposes of my next question. If the
4 net present value of the licenses was expected to be,
5 say, \$30 million as of June 1997 and the payment
6 stream, applying a reasonable discount rate, was at \$54
7 million, so we're \$30 million of licenses, \$54 million
8 of payments, that would violate the Bresnahan rule,
9 because there would be net positive value going to the
10 generic firm. Is that correct?

11 A. Yes, that's -- that's correct. If there were
12 -- if the present value assessed at that time of the
13 licenses were less, that would violate my test.

14 Q. All right. Even if in reality, as time plays
15 out, it turned out that those products did very, very
16 well, you would still say because they expected only
17 \$30 million, then it was violated. Is that correct?
18 You look at the expectations as of June 1997 as to
19 value, correct?

20 A. Yes.

21 Q. All right.

22 Your Honor, we're at a good breaking point if
23 you would like to take a short break now or --

24 JUDGE CHAPPELL: We need to press on. We have
25 only been here about an hour.

1 MR. GIDLEY: All right, sir.

2 JUDGE CHAPPELL: I'll be looking to break
3 around 3:30 if you're still there, Mr. Gidley.

4 MR. GIDLEY: All right, Your Honor, very good.

5 Simply for identification purposes, we'll mark
6 this for identification purposes, Your Honor, as USX
7 1016.

8 (USX Exhibit Number 1016 was marked for
9 identification.)

10 BY MR. GIDLEY:

11 Q. This is simply a demonstrative, Professor
12 Bresnahan, summarizing the six pharmaceutical products
13 that were licensed to Schering-Plough. Do you see that
14 document?

15 A. I do.

16 Q. Now, sir, are those the six products that are
17 contained in the June 17, 1997 agreement? And if you
18 need a minute to compare it against the agreement --

19 A. No, no, those are the six products.

20 Q. All right, so Niacor-SR, which is the sustained
21 release niacin product, correct?

22 A. Yes.

23 Q. Pentoxifylline, which is another heart drug,
24 cardiac drug, it's designed to improve vascular
25 performance, correct?

1 A. It seems like it.

2 Q. Prevalite, which is a bile acid sequestrant,
3 which literally means that it acts to let your body
4 naturally secrete more cholesterol, it takes it out of
5 serum cholesterol, that's a third product on this
6 slide, correct?

7 A. Yes.

8 Q. All right. And then there are the three Klor
9 Con products, correct?

10 A. Yes.

11 Q. And these are licenses that go outside of
12 Canada, the U.S. and Mexico, correct?

13 A. Yes.

14 Q. All right. So, it's the rest of the world that
15 Schering got, correct?

16 A. Yes.

17 Q. Now, in 1997, did Upsher-Smith have any sales
18 force or presence outside the United States?

19 A. Not to my knowledge.

20 Q. Do you think it was pro-competitive for
21 Upsher-Smith to locate a partner with a worldwide
22 system of offices and marketing personnel to market its
23 products outside of North America?

24 A. Yes, I believe that that alone was
25 pro-competitive.

1 Q. All right. So, in an area where you don't have
2 any salespeople and you have no sales presence,
3 licensing it to another firm will generate more revenue
4 and make a product more widely available, will it not?

5 A. Yes.

6 Q. And in that sense it's pro-competitive, sir?

7 A. Yes, it's an act of supply.

8 Q. All right, I want to go back to the Bresnahan
9 rule. Suppose that the parties believed subjectively
10 and honestly that as of June 1997 that the licenses for
11 these six products were worth \$100 million or \$200
12 million in net present value. Do you have that
13 assumption in your head? Let's say in excess of \$100
14 million.

15 A. I'm sorry, I just lost the question.

16 Q. That's all right.

17 Taking a look at paragraphs 4 -- excuse me,
18 paragraphs 7 through 10, if Schering-Plough believed
19 that the license of these products and the supply
20 agreement associated with these licenses were worth
21 more than \$100 million, would that not take the
22 agreement outside the Bresnahan rule?

23 A. Yes, the -- yes, if Schering-Plough had made a
24 stand-alone determination that it was getting as much
25 in return from these products as it was paying, then I

1 would infer that they were not paying for delay.

2 Q. So, if in June 1997 Schering-Plough
3 subjectively and honestly believed that the licenses
4 were worth more than \$100 million, under the Bresnahan
5 test, such an agreement, such a license agreement would
6 not be anti-competitive. Is that correct?

7 A. Yes, although the "subjectively and honestly"
8 are -- aren't really economic concepts. The -- you
9 know, that may be closer to a hard-headed business
10 evaluation of them, that's closer to an economic
11 concept.

12 Q. I just want to understand that, because I live
13 in a legal world where I've got to try to figure out
14 whether or not this Bresnahan test can be met. If the
15 Schering-Plough executives honestly believed, they did
16 spreadsheets and they honestly believed that the six
17 products of the license exceed -- the net present value
18 of the licenses exceeded \$100 million, wouldn't that
19 satisfy the Bresnahan test, and under those
20 circumstances, the side license would not be
21 anti-competitive?

22 A. I don't -- the -- the "honestly believed," if
23 they honestly believed that, if that was their real
24 business judgment about these things, then yes. I
25 mean, the honesty part of it is -- I guess that's a

1 legal -- a legal thing. The subjective and business
2 judgment part of it are more the economic thing.

3 Q. And I'm just trying to understand whether the
4 Schering-Plough executives are just going to be
5 second-guessed by the Bresnahan test and it's got some
6 kind of ultimate objective value that they need to
7 worry about, or whether if they honestly do the work
8 and honestly believe that it's \$100 million, whether
9 that would satisfy the Bresnahan test.

10 A. Certainly the Bresnahan test, as I've
11 implemented it, doesn't use an alternative valuation
12 mechanism which I would put forth as more objective
13 than theirs. That's not what it is. So, on that part
14 of your question, I agree with you.

15 Q. Okay. So, it would be something that we would
16 look to the honest belief, the sincerely held belief of
17 the Schering-Plough executives, correct?

18 A. I just --

19 MR. KADES: Objection, Your Honor. I think
20 this question's been asked and answered multiple times
21 at this point.

22 MR. GIDLEY: Your Honor, I'm listening to these
23 answers, and I don't know that I've got a clean answer.
24 I'd like to get a clean answer to a straightforward
25 hypothetical that goes to the heart of the case.

1 JUDGE CHAPPELL: I am going to overrule the
2 objection, only because I'm not sure the witness --
3 either he's not listening or he's trying to be evasive,
4 and if we don't get an answer soon, then you're just
5 going to have to ask him what would meet the test, Mr.
6 Gidley, but at this point, let's -- I'm going to
7 overrule the objection, and read back the question and
8 let the witness answer.

9 (The record was read as follows:)

10 "QUESTION: So, it would be something that we
11 would look to the honest belief, the sincerely held
12 belief of the Schering-Plough executives, correct?"

13 THE WITNESS: The -- I -- I don't speak to
14 their honesty. I mean, that -- the -- or belief.
15 Certainly the -- that their expectation, their
16 subjective expectation at that time is what it's -- is
17 what it's about. The business people can come to
18 beliefs through either sober business judgments or by
19 other mechanisms. If it were based on sober business
20 judgment, the value, then I would say yes, the -- then
21 there's no payment for delay. If it were honestly held
22 but come to by some other way, I just don't know. It's
23 outside my purview.

24 BY MR. GIDLEY:

25 Q. Well, as long as in the ordinary course of

1 business they evaluate the license, they run
2 projections and there's no evidence that they
3 disbelieve the projections, they are honestly arrived
4 at projections, if they objectively and sincerely
5 believe in the projections, that the licenses together
6 exceed \$100 million, would that not satisfy the
7 Bresnahan test that such an agreement with such a side
8 deal would be -- would not be deemed anti-competitive
9 under your test?

10 A. If it's in the ordinary course of business,
11 then I think I agree with you, yes.

12 Q. And as I understand your test, you don't impose
13 some minimum due diligence requirement in the face of
14 the test. Isn't that correct? That's not in the text
15 of your test.

16 A. No, that's not within my purview either.

17 Q. Let me direct your attention, if I could, to
18 tab 6, and I'm in the blue cross examination book, tab
19 6. If I could sir, I want to direct your attention to
20 CX 338.

21 A. Yes.

22 Q. Before we get to the document, I want to ask
23 you a question about your report that's a related
24 question.

25 As I understand your report, you do not contend

1 that there is a naked payment for delay in this case.

2 Is that correct?

3 A. That's correct.

4 Q. In other words, there is not a straight out
5 payment of X million dollars in return for delay.

6 There is not a naked payment for delay. This is a case
7 about a disguised payment for delay. Isn't that
8 correct?

9 A. That's my understanding -- well, yes, that's
10 what I said.

11 Q. All right. And sir, I want to understand who
12 disguised the payment, and if I could direct your
13 attention to the cover page of this document -- by the
14 way, sir, first, have you reviewed this document
15 previously?

16 A. I think so, yes.

17 Q. You testified about it on your direct, did you
18 not?

19 A. Yes.

20 Q. You have an understanding that at
21 Schering-Plough there was a board of directors meeting
22 where the agreement that's at the heart of this case
23 came up for evaluation and consideration, do you not?

24 A. Yes.

25 Q. Now, as I understand it -- and I don't work

1 for Schering -- as I understand it, the two recipients
2 are members of the board or people who work with the
3 board of directors of Schering-Plough. I see some
4 directors there. Is that your understanding of the
5 first page?

6 A. Yes.

7 Q. I see references made to Hans Becherer, B E C H
8 E R E R.

9 A. Yes.

10 Q. H. Barclay Morley, do you see that name?

11 A. Yes.

12 Q. Carl E. Mundy, Junior?

13 A. Yes.

14 Q. Patricia F. Russo, do you see that?

15 A. Yes.

16 Q. Now, sir, do you believe that the directors of
17 Schering-Plough themselves disguised the payment in
18 this case?

19 A. I don't have a view of that.

20 Q. Have you formed the view that any particular
21 business person on the Schering-Plough side paid or
22 made a disguised payment and used furtive means,
23 secretive means, to keep the true nature of this
24 agreement from others? Have you formed that conclusion
25 with respect to any Schering-Plough executive?

1 A. Not with respect to any individual.

2 Q. All right. How about Upsher-Smith, have you
3 formed an opinion that any of the Upsher-Smith
4 executives or members of the Upsher-Smith board
5 actually concluded that they were going to disguise a
6 payment for delay in the June 17, 1997 agreement?

7 A. No, not as individuals.

8 Q. I'm sorry?

9 A. No, not as individuals. Sorry.

10 Q. So, we have a disguised payment, but at this
11 point you haven't identified who disguised the payment.
12 Is that fair?

13 A. Yes.

14 Q. All right. Do you have speculation or an
15 opinion or an informed opinion as to whether or not the
16 Schering-Plough board was misled by Schering executives
17 or themselves were disguising the payment? Have you
18 formed an inference or a conclusion one way or the
19 other on that question?

20 A. No, I haven't.

21 Q. Have you reviewed this entire board of present
22 -- board of directors presentation?

23 A. Yes, I think so.

24 Q. Would you say in the text contained at Bates
25 number pages 268 through 272, there's a rather detailed

1 discussion of the June 17, 1997 agreement?

2 A. I'm sorry, was that a question? I didn't get a
3 question.

4 Q. Yes. On those pages, on those five pages,
5 isn't there a relatively detailed discussion of the
6 terms of the June 17, 1997 agreement?

7 A. There is -- there is a discussion of the
8 agreement here in some -- in some detail, yes.

9 Q. Right. And all of the products that you and I
10 have been discussing, Niacor-SR, pentoxifylline,
11 Prevalite and Klor Con, those all appear in the text of
12 this document, do they not?

13 A. They do.

14 Q. In fact, there's also some reference made to
15 some of the supply agreement terms, is there not?

16 A. I believe there is, yes.

17 Q. All right. Now, is it your testimony that
18 there are misstatements or mischaracterizations of the
19 license in Bates number pages 268 through 272?

20 A. No.

21 Q. There's no sentence in those five pages that
22 you can facially say from scrutinizing the document and
23 your work in this case is a dishonest sentence. Is
24 that correct?

25 A. I have -- I have not looked at it for that

1 purpose, but I don't believe that there is one.

2 Q. Right. Now, as I understood the direct, the
3 last sentence of the second paragraph has this
4 reference, but there's a little bit of redaction. I'm
5 on page 268.

6 A. Yes.

7 Q. And it talks about a patent litigation at the
8 top of the paragraph. Do you see that?

9 A. Yes.

10 Q. And do you have an understanding what patent
11 litigation that was? That was the '743 trial, wasn't
12 it?

13 A. That's my understanding, yes.

14 Q. All right. And in the last sentence, "we
15 informed them," which I read as Schering-Plough
16 informed them, meaning Upsher, my client, "that any
17 such deal should stand on its own merit independent of
18 the settlement."

19 Do you see that?

20 A. I do.

21 Q. Now, you don't accord that language very much
22 weight, if I understood your direct testimony. Did I
23 get that right?

24 A. That's right.

25 Q. Now, staring at the five pages here, what from

1 staring at the language enables you to assess the
2 credibility of that statement as opposed to other
3 statements that are contained in this document?

4 A. I don't -- I don't assess the credibility of
5 that statement, Counsel.

6 Q. You haven't met any of the directors of
7 Schering-Plough Corporation. Is that correct?

8 A. I believe I've met Ms. Herzlinger.

9 Q. All right. When was that?

10 A. Years ago.

11 Q. All right. But in connection with this case,
12 you haven't met them or discussed this case?

13 A. No.

14 Q. And you didn't attend any of their depositions
15 or IH hearings. Is that correct?

16 A. That's correct.

17 Q. All right. You're in no position to assess
18 their credibility as witnesses. Is that correct?

19 A. That's correct.

20 Q. Do you know who authored this document, these
21 five pages?

22 A. I don't recall. I believe it may have been Mr.
23 Wasserstein.

24 Q. All right. May I direct your attention to
25 Table 1? That's found at SP 12 273. I want to set

1 aside the test that you talked about on your direct,
2 and I just want to look at these numbers for a minute.

3 Do you see in Table 1 there's a projection of
4 sales for various years starting in 1999 and going out
5 to 2008, is there not?

6 A. Yes.

7 Q. And these are sales projections for Niacor-SR
8 worldwide sales, correct?

9 A. I believe that's right or outside NAFTA.

10 Q. Right, except U.S., Canada and Mexico it says
11 at the top, right?

12 A. Yes.

13 Q. Now, based on your work, you have not
14 independently second-guessed this sales projection.
15 You don't have substitute numbers for these columns, do
16 you, sir?

17 A. I do not.

18 Q. And in terms of the cost of goods sold --
19 that's the COGS line, right?

20 A. Yes.

21 Q. The COGS line, you haven't done your own
22 modeling of the cost of goods sold in these various
23 years, have you, sir?

24 A. No, I have not.

25 Q. So, you don't have any basis to second-guess

1 the COGS line of numbers in this document. Is that
2 correct?

3 A. No, I have not attempted to do that.

4 Q. And in the third line, Selling/Promo, \$13.5
5 million going on out to 2008, you don't have different
6 numbers that you would substitute in each one of those
7 years. Is that correct?

8 A. No, I have not attempted to replicate this
9 analysis.

10 Q. And then in terms finally of net, which I take
11 it is some measure of profits, \$27 million, \$45.5
12 million, \$79 million, \$100.8 million, et cetera, you
13 don't have different profits in these out-years, do
14 you, sir?

15 A. I do not.

16 Q. You don't have a re-analysis of this table in
17 your August report, do you?

18 A. That's correct.

19 Q. And you don't have a re-analysis of this table
20 in your November report. Is that correct?

21 A. That's correct.

22 Q. And as you sit here today, are you able to
23 testify that any one of these numbers in particular is
24 false or fraudulent at the time that this document was
25 written?

1 A. No.

2 Q. Do you see the next slide, Niacor-SR Earnings
3 Impact? And actually, I am going to ask you questions,
4 if I could, sir, about the next two pages, so if you
5 could familiarize yourself with 274 and 275.

6 A. Yes.

7 Q. Does it appear to you at this point that the
8 Schering-Plough executives were trying to project the
9 impact on the shareholders of Schering-Plough
10 Corporation of this transaction, were they not?

11 A. Yes.

12 Q. And in business jargon, they were trying to
13 figure out whether this transaction was accretive or
14 dilutive to earnings. Isn't that correct?

15 A. That sounds like the right jargon, yes.

16 Q. All right. And that would in particular be the
17 way to read 275, correct?

18 A. Yes.

19 Q. And why is an assessment of whether something's
20 accretive or dilutive, why is that important for a
21 board of directors to focus on?

22 A. A board looking to pay out money wants to know
23 whether it's getting something back that will rebound
24 positively to the value of the corporation.

25 Q. Now, at the bottom of 275, I see the phrase

1 "Economic Value, \$225 to \$265 million."

2 Do you see that?

3 A. Yes.

4 Q. You don't have your own separate number for the
5 economic value of Niacor-SR, correct?

6 A. That's correct.

7 Q. All right. And is it your understanding that
8 the number \$225 to \$265 million is a net present value
9 as of approximately June 1997? Is that the way to read
10 this?

11 A. I believe that that's what the document is
12 trying to calculate.

13 Q. I want to direct your attention to a few
14 statements that are in the board of directors
15 presentation, if I could. Could you please turn,
16 Professor, to page 268, the paragraph underneath the
17 heading Niacor-SR?

18 A. Yes.

19 Q. This memo says in the third line, does it not,
20 "It," Niacor-SR, "offers a \$100+ million annual sales
21 opportunity for Schering-Plough," does it not?

22 A. Yes. You took out the word "in," which seems
23 to me like it's a typo.

24 Q. But in terms of the point that they're making
25 to the directors, the author of this document presents

1 to the board the opportunity to make \$100 million in
2 annual sales, correct?

3 A. Yes.

4 Q. Turning the page, underneath the heading World
5 Wide Cholesterol Lowering Market, the author of this
6 document notes that, "The world wide --" I'm at the
7 second full paragraph.

8 A. Where are you?

9 Q. Are you there, page 269?

10 A. I'm on page 269, but I'm not with you.

11 Q. "The world wide cholesterol-lowering market (ex
12 U.S., Canada and Mexico) was nearly \$4 billion in
13 1996."

14 Do you see that?

15 A. I do.

16 Q. Let's go to a discussion of niacin itself,
17 middle of the page.

18 "Niacin has long been recognized as an
19 effective agent for treating hypercholesterolemia. It
20 has a unique profile among all of the classes of drugs
21 used to treat elevated cholesterol levels in that it
22 beneficially impacts high-density lipoproteins (HDL),
23 triglycerides, LP(a) and LDL."

24 Do you see that?

25 A. Yes.

1 Q. And you don't have any reason to second-guess
2 that, do you, sitting here today?

3 A. No.

4 Q. Can I direct your attention to the fourth
5 bullet underneath that paragraph where it says, "There
6 has been no promotion for niacin."

7 Do you see that?

8 A. Yes.

9 Q. Sir, is it your testimony based on the
10 examination today and yesterday and some of the
11 materials we've reviewed that properly promoted, there
12 might be potential for the niacin product as of June
13 1997?

14 A. It's -- I don't -- I don't have an opinion on
15 that.

16 Q. You haven't modeled whether or not promotional
17 expenses, detailing and marketing could take niacin and
18 make it a successful product in these territories, have
19 you?

20 A. No, not at -- not above the tests I've
21 described earlier.

22 Q. Turning to the next page, Niacor-SR Opportunity
23 is the heading, I simply want to direct your attention
24 to the second sentence. Are you there on 270?

25 A. Yes.

1 Q. "In addition, in clinical trials, it,"
2 Niacor-SR, "has been shown by Upsher-Smith that
3 Niacor-SR can reduce LDL-C by 20%, raise HDL by 16% and
4 reduce TG's by 16%."

5 Do you see that?

6 A. Yes.

7 Q. You don't have any basis for second-guessing
8 that statement as of the date of this document, do you?

9 A. No, I don't.

10 Q. Now, had the product been sold, there would
11 have been milestone payments with the launch of the
12 product in various countries, and those are found at
13 the bottom of page 270, are they not?

14 A. That's correct.

15 Q. And on pages 271 and 272, there's a discussion
16 of other products, is there not?

17 A. Yes.

18 Q. And there's a discussion of Prevalite, right?

19 A. Yes.

20 Q. Klor Con?

21 A. Yes.

22 Q. And pentoxifylline, right?

23 A. Yes.

24 Q. Now, your report doesn't treat the other five
25 drugs, does it?

1 A. That -- you mean other than Niacor?

2 Q. That's correct.

3 A. Yes.

4 Q. It does not.

5 A. That's right.

6 Q. I'd like to go back to the topic of the
7 Hatch-Waxman Act. Do you recall Exhibit A17, that's
8 the one which referenced the court decision Mova and
9 Granutec? It's in your report.

10 A. Yes, yes.

11 Q. Now, the development of the law under the
12 Hatch-Waxman Act in economic terms is exogenous to both
13 Upsher-Smith and Schering-Plough, is it not? It's not
14 something that either firm could itself influence as of
15 June 1997. Isn't that correct?

16 A. I think that's right, yes.

17 Q. All right. It's something that happened later
18 on as a result of court decisions, did it not?

19 A. Well, earlier and later on. It happened as a
20 result of court decisions.

21 Q. I believe your testimony on direct was that
22 there was uncertainty, and I think Mr. Hoffman used the
23 phrase "substantial uncertainty," as of June 1997. Is
24 that correct?

25 A. Yes.

1 Q. I'd like to direct your attention back to the
2 June 1997 agreement, which is found in the cross
3 examination exhibits. That's the blue book at tab 5.

4 A. Thank you.

5 Q. CX 348. May I direct your attention, sir, to
6 Exhibit A, paragraph 3, found on Bates number 3186.

7 A. Yes.

8 Q. In yellow highlight, that would be what I call
9 the "other tablet" phrasing, and let me read the whole
10 sentence and then I am going to ask you questions about
11 this clause that's yellow highlighted.

12 "Upsher-Smith agrees that it will not market in
13 the United States its Klor Con M20 potassium chloride
14 product or any other sustained release
15 microencapsulated potassium chloride tablet prior to
16 September 1, 2001."

17 Do you see that?

18 A. Yes.

19 Q. Now, an agreement between Upsher-Smith and
20 Schering-Plough on the entry date with no side license,
21 that would not violate the Bresnahan test, correct?

22 A. Yes.

23 Q. That would not be anti-competitive under your
24 test.

25 A. Yes.

1 Q. Now, as I understand your report, you do
2 contend that it was anti-competitive for this
3 additional language to be added, "or any other
4 sustained release microencapsulated potassium chloride
5 tablet."

6 Do you see that?

7 A. Yes.

8 Q. Sir, have you been able -- you haven't -- you
9 have been unable to identify a single Upsher-Smith
10 product that was blocked by this language. Isn't that
11 correct?

12 A. That's correct.

13 Q. And sir, you have not examined the Upsher-Smith
14 product pipeline, have you, sir?

15 A. No.

16 Q. And you have no evidence that Schering-Plough,
17 as you sit here today, had any other product in mind
18 other than the Klor Con M20 product. Isn't that
19 correct?

20 A. That's right, too.

21 Q. And you have no evidence as you sit here today
22 that Upsher-Smith had any other product in mind other
23 than Klor Con M20. Isn't that correct?

24 A. Yes.

25 Q. Now, as of the time of your report, you had not

1 read the patent all the way through. Isn't that
2 correct?

3 A. That's correct.

4 Q. Have you consulted with a biochemist or
5 pharmacologist to ascertain whether there is even the
6 possibility of any other sustained release
7 microencapsulated potassium chloride tablet that could,
8 as a matter of chemistry, be introduced that did not
9 infringe the '743 patent?

10 A. I have not made any such inquiries.

11 Q. And you have not, I take it, consulted with an
12 independent patent expert, somebody outside of the
13 Federal Trade Commission, as to whether or not there is
14 any other product that's possible as a tablet that
15 would not infringe on the '743 patent.

16 A. That's right.

17 Q. Sir, isn't it quite possible that this language
18 actually facilitates a pro-competitive settlement in
19 the sense that it rules out a me-too product that is
20 simply introduced under another name other than Klor
21 Con M20 but is, in fact, Klor Con M20? Isn't that a
22 possible reading of this language?

23 A. If the -- if the contract were otherwise
24 pro-competitive, that would be a reasonable reading of
25 this language.

1 Q. And there's a term for that. It's called
2 ancillary restraints, isn't there, that sometimes we
3 tolerate things like a covenant not-to-compete to
4 further and facilitate a pro-competitive agreement?
5 Isn't there such a doctrine under the antitrust laws?

6 A. I don't know about the label that you -- that
7 you gave it, but it -- but it sounds like the
8 right --

9 Q. Let me confine my question to economics. Isn't
10 there the concept in economics with a joint venture or
11 other kind of agreement that you can have an ancillary
12 restraint, and if it furthers a pro-competitive
13 agreement, it's not itself anti-competitive? Isn't
14 there such a concept?

15 A. I don't -- I don't know about the label, but
16 the logic sounds right to me. If an agreement is
17 otherwise pro-competitive, such a restraint would not
18 render it anti-competitive.

19 Q. And again, just so I understand your answer, if
20 the licenses were worth \$100 million and Upsher was
21 getting a net present value of \$54.5 million so that
22 the value of the licenses exceeds what my client is
23 taking in the up-front payment, this term by itself
24 would not be anti-competitive, would it?

25 A. Well, I don't -- I don't understand the "if"

1 part of your question at all. The -- the -- if the
2 agreement were otherwise not anti-competitive and if
3 there were no other pipeline product that was known or
4 suspected to the two parties, then -- then I wouldn't
5 -- then this might be part of a -- of that
6 pro-competitive agreement.

7 Q. And I want to understand your answer very
8 carefully. First, do you have any evidence that anyone
9 at Upsher-Smith believed that there was another product
10 being described here other than Klor Con M20 as of June
11 1997?

12 A. No.

13 Q. Do you have any evidence that anyone at
14 Schering-Plough thought that this was describing
15 anything other than Klor Con M20 as of June 1997?

16 A. No.

17 Q. And even if this was talking about some kind of
18 other hypothetical me-too drug, if the overall
19 agreement was pro-competitive in that the side
20 licensing agreement gave more value to Schering-Plough
21 than Upsher-Smith took back in the \$54 million net
22 present value, that's the \$100 million versus the \$54
23 million, you wouldn't believe that this is
24 anti-competitive. Is that correct?

25 A. I -- it's still the -- Counselor, you

1 re-introduced the condition which seems to me to be --
2 I mean, that -- that wouldn't show that the agreement
3 was pro-competitive.

4 Q. All right, let's break it down.

5 Let's just say first that the agreement on the
6 licenses is pro-competitive. If you make that
7 assumption, this restraint by itself is not
8 anti-competitive, correct?

9 A. No, not under the assumptions we've been
10 making. If the agreement on Klor Con M20 were
11 pro-competitive, then under the other assumptions
12 you've asked me about the other products, this wouldn't
13 necessarily be anti-competitive.

14 Q. All right. And if the value of the licenses is
15 \$100 million and the up-front payment -- net present
16 value again, both in June of 1997 -- is \$54.5 million,
17 sir, do you contend that paragraph 3, this "other
18 tablet" language, is anti-competitive?

19 A. The "if" -- the "if" doesn't help me. I mean,
20 the -- the "if" -- that could be -- that could be
21 true, and the -- you know, there's other payments in
22 here, you know, there's the noncontingent payment.
23 Maybe I just don't understand your question.

24 Q. I'd be happy to break it down for you.

25 A. Okay.

1 Q. Let's take all of -- let's take the bundle of
2 license rights.

3 A. Okay.

4 Q. Six drugs in this case.

5 A. Yes.

6 Q. Supply agreement, everything else that was
7 granted by my client, Upsher-Smith, to Schering-Plough.

8 A. Yes.

9 Q. Do you have that bundle of rights?

10 A. Yes.

11 Q. And let's say that we're Upsher-Smith getting
12 \$54.5 million of value in these payments and the net
13 present value of the payments is \$54.5 million. Do you
14 have that so far?

15 A. Yes, as a hypothetical.

16 Q. All right, yes, as a hypothetical. And
17 Schering-Plough values that bundle of rights at \$100
18 million. Are you with me so far? We're in June of
19 1997.

20 A. Yes.

21 Q. All right. Now, that you told me earlier is
22 not -- that's not anti-competitive. That doesn't
23 violate the Bresnahan test, correct?

24 A. Well --

25 Q. That's --

1 A. -- I don't think that's what -- I'm not sure
2 that's what I said. The -- the -- if -- if both
3 parties thought they were ahead just on the licensing
4 deal in itself, you know, including both its
5 noncontingent and its contingent parts, that's what
6 would not violate my test.

7 Q. I'm not sure I understand your answer, so let
8 me try to pitch it another way.

9 Under part three of the Bresnahan test, we have
10 a transaction where there is no net positive value
11 going to Upsher-Smith, so there's cash payment coming
12 in of \$54.5 million to Upsher-Smith, and there are a
13 bundle of license rights that Schering-Plough values at
14 \$100 million or more. Have you got that? We're
15 talking about June of '97.

16 A. Values them on a sort of stand-alone business
17 basis.

18 Q. Right, and we're in June of '97. So, the
19 Bresnahan test is not met, correct? It's not an
20 anti-competitive transaction under that hypothetical,
21 correct?

22 A. Yes.

23 Q. All right. And now let's assume that this
24 language from paragraph 3 about other tablets is also
25 part of the agreement. Is it your testimony that this

1 paragraph -- that this language about other tablets is
2 independently anti-competitive in that context?

3 A. No, not if it -- not if there are no other --
4 I could imagine that this would be used to enforce a
5 non -- a pro-competitive agreement and that this -- if
6 the rest of the agreement were pro-competitive and if
7 there were no other tablets, that this wouldn't render
8 it necessarily anti-competitive.

9 Q. And in your testimony, when you say "this,"
10 you're talking about the "other tablet" language,
11 correct?

12 A. The highlighted language here, yes.

13 Q. All right. As I read your report, sir, at one
14 point in the report you make a calculation or an
15 assumption that both parties saved \$3 million in
16 litigation expense. Do you recall that assumption?

17 A. I made that assumption, yes.

18 Q. So, by settling the lawsuit, Schering-Plough
19 let's say -- we'll make an assumption -- saved under
20 your analysis approximately \$3 million. Is that fair?

21 A. Of litigation costs, yes.

22 Q. All right. Now, we've been talking about \$54.5
23 million of value going to Upsher-Smith. Isn't that \$3
24 million of value going over to Schering-Plough, the
25 savings in the litigation?

1 A. I'm sorry, which \$3 million -- I don't -- I
2 really don't understand the question.

3 Q. I'll start it over.

4 I'm talking about Schering-Plough's litigation
5 expenses in connection with the '743 litigation.

6 A. Schering-Plough's litigation, ongoing
7 litigation expenses.

8 Q. Your report assumes or estimates the savings to
9 Schering-Plough of approximately \$3 million. Do you
10 recall that?

11 A. Yes.

12 Q. All right. So, let's go to the June '97
13 agreement in this case. The net present value of the
14 three payments is \$54.5 million, correct?

15 A. Yes.

16 Q. All right. The \$3 million that Schering-Plough
17 saved in litigation expenses is value that they gained
18 from the settlement agreement, the June 17, 1997
19 agreement, correct?

20 A. Yes.

21 Q. All right. So, in performing the Bresnahan
22 test, shouldn't Upsher-Smith get a \$3 million credit so
23 that we would be looking at \$51.5 million for this
24 range or estimate of the litigation expense saved by
25 Schering-Plough? That's a value they got for the

1 settlement.

2 A. I don't understand -- I don't understand your
3 calculation. When I make my calculation -- when I --
4 when I make my calculation from each firm's
5 perspective, I credit it with saving its \$3 million of
6 litigation costs.

7 Q. Professor Bresnahan, maybe it would help if I
8 just diagrammed this.

9 Do you see that bar that I've written that is
10 \$54.5 million NPV?

11 A. Yes.

12 Q. All right. That's value that -- that's the
13 net present value to Upsher-Smith of the stream of
14 payments that's contained in the June 1997 agreement,
15 correct?

16 A. Yes.

17 Q. Now, as a result of settling the litigation,
18 didn't Schering-Plough save its litigation expenses had
19 the '743 litigation continued?

20 A. Yes.

21 Q. To that extent, didn't Schering-Plough pick up
22 \$3 million of value just in settling the litigation,
23 because it --

24 A. Yeah.

25 Q. -- saved, it avoided that legal cost?

1 A. Yes.

2 Q. All right. So, in applying the Bresnahan test,
3 shouldn't Upsher-Smith get a \$3 million credit so that
4 when we look at the value of the licenses, we'd be
5 looking at it against a \$51.5 million NPV?

6 A. No, Upsher -- Upsher doesn't get paid that
7 money. Upsher saves its \$3 million, too. So, it
8 hasn't paid out some \$3 million.

9 Q. I honestly don't understand -- I didn't mean
10 to cut you off.

11 A. Yeah.

12 Q. Are you finished your answer?

13 A. Yes.

14 Q. I honestly don't understand your test. Let's
15 start with the \$54.5 million. That's something of a
16 constant at this point, isn't it?

17 A. Yes.

18 Q. That's the net present value of those three
19 payments, \$28, \$20 and \$12 million, right?

20 A. Yes.

21 Q. Okay. Upsher-Smith, when we apply the
22 Bresnahan test, because these are up-front payments --
23 and let's just assume they're noncontingent for this
24 question -- they're getting a value of \$54.5 million,
25 right?

1 A. Yes.

2 Q. Okay. Now, Schering-Plough, as one of the
3 benefits from the settlement, according to your report,
4 saved approximately \$3 million, correct?

5 A. That's correct.

6 Q. All right. So, that's a benefit they got, and
7 I'm going to put that over here under the
8 Schering-Plough column.

9 A. That's correct, and when I -- when I do, for
10 example, my ranges calculation, I make an appropriate
11 credit of \$3 million.

12 Q. Right, I recall that, and that's really what
13 prompted my questions on this point.

14 Isn't it the case that if Schering-Plough's
15 bundle of license rights we've been talking about, the
16 six drugs that are on that slide, pentoxifylline,
17 Prevalite, the Klor Con drugs, all six drugs, if those
18 six products plus this \$3 million exceeds \$51.5 million
19 -- strike that, let me start this over.

20 If the value of the six products exceeds \$51.5
21 million, hasn't Schering-Plough received the value of
22 the six products exceeding \$51.5 million plus the
23 litigation savings?

24 A. Right, when I do a -- and when I -- in my
25 ranges analysis, when I do a Schering-Plough eye view,

1 okay, they're out the three payments, the ones with the
2 present value of \$54.5, and they, Schering, get the \$3
3 million back.

4 Q. Okay. So, if the licenses were worth let's say
5 \$53 million -- I think this example may help. If the
6 six products, net present value, are worth \$53 million
7 plus Schering-Plough is saving \$3 million in litigation
8 expense, wouldn't that satisfy the Bresnahan test where
9 on the Upsher-Smith side we're looking at \$54 million?

10 A. Well, I mean again, that's not the form of this
11 transaction. There's the contingent and the
12 uncontingent payments. I mean, so, no, not
13 necessarily.

14 Q. I just want to understand your test. We're
15 going to look at net present values in June of 1997.
16 The three payments are worth \$54.5 million.
17 Schering-Plough gets \$3 million of litigation savings,
18 and the six products -- I'll just write it on here --
19 the six products are worth \$52 million in net present
20 value, okay? So that if we were to compare the six
21 products at \$52 million versus the \$54.5 million, we
22 might have a violation of the Bresnahan test --

23 A. See, I -- I mean, it's --

24 Q. It's a hypothetical.

25 A. -- it's completely a hypothetical, because the

1 -- you know, the -- if -- if the most valuable, as I
2 understand it, of the six products, the Niacor-SR, is
3 worth \$52 million, they pay more money than this.

4 Q. I'm going to ask it one more time and then I'll
5 just move on.

6 If the six products being licensed have a net
7 present value to Schering -- honestly held, they do
8 their projections -- of \$53 million, Schering also
9 saves \$3 million in litigation expenses, and on the
10 Upsher-Smith side, we have \$54 million -- \$54.5
11 million of NPV. Is the Bresnahan test for an
12 anti-competitive settlement -- is it met or is the
13 agreement, you know, not anti-competitive?

14 A. The -- the -- if the six products have that
15 without any share of Niacor-SR, then -- without --
16 I'm sorry, without any sales of Niacor-SR have that
17 value, that would be the right calculation, but that's
18 -- that's not the right -- but that's -- that's not
19 this contract.

20 Q. The litigation cost savings of Schering-Plough,
21 is that part of the Bresnahan test?

22 A. Yes.

23 Q. And Upsher-Smith gets credit for that savings?

24 A. Schering -- I don't know what you mean by
25 "Upsher-Smith gets credit for that savings." The

1 Schering -- in my calculation of the ranges, Schering
2 paid less because they saved the litigation costs. So,
3 that's -- that's a credit, but it's not -- it's not
4 like they paid that to Schering -- to Upsher.

5 Q. Let's try it this way: Do you net out the
6 litigation savings or are you willing to give
7 Upsher-Smith a credit for the savings of the
8 Schering-Plough attorneys' fees under the Bresnahan
9 test?

10 A. No, I don't give Upsher a credit for Schering's
11 savings. That's a savings to Schering.

12 Q. And that's not value to Schering-Plough?

13 A. It is value to Schering-Plough.

14 Q. But it doesn't get credited to Upsher-Smith?

15 A. No. Upsher, too, saved its litigation costs.

16 Q. Let me start with a --

17 A. Maybe I don't -- I -- maybe I should have
18 asked what you meant by "credited."

19 Q. Well, I'm just wondering whether it goes into
20 the calculation one way or the other when we're trying
21 to just apply honestly the Bresnahan test.

22 A. Yes.

23 Q. Do -- okay. And just so I have it clear, you
24 will consider attorneys' fee savings in applying the
25 Bresnahan test, correct?

1 A. Yes.

2 Q. All right. And Schering-Plough undoubtedly, on
3 the eve of trial, saved some attorneys' fees by virtue
4 of the June 17, 1997 agreement, correct?

5 A. Yes, as did Upsher.

6 Q. All right. Assuming Upsher got \$54.5 million
7 of net present value, do we subtract from the \$54.5
8 million in the net positive value calculation of prong
9 three of the Bresnahan test the \$3 million saved by
10 Schering-Plough? Yes or no.

11 A. Mr. Gidley was talking as fast as usual and
12 more softly. Would you read it back, please?

13 JUDGE CHAPPELL: Before you read it back, it's
14 about 3:30. Let's take a break. We're going to recess
15 for 20 minutes. We'll reconvene at 3:50, 3-5-0. We're
16 in recess.

17 (A brief recess was taken.)

18 JUDGE CHAPPELL: Back on the record.

19 You may proceed.

20 MR. GIDLEY: Before we go on, Your Honor, do
21 you have enough water and so forth to get through this,
22 Professor?

23 THE WITNESS: Yes, thank you.

24 BY MR. GIDLEY:

25 Q. All right, Professor Bresnahan, earlier today

1 we talked about the issue of the 30 percent price
2 differential between generic potassium chloride and
3 K-Dur 20. Do you recall that discussion?

4 A. I do.

5 Q. And if I understood your testimony, sir, the
6 fact that there was for a sustained period of time that
7 30 percent price differential between K-Dur 20, the
8 branded good, and the generic potassium chloride was
9 one of the bases for you concluding that there existed
10 a 20 mEq tablet and capsule product market. Isn't that
11 correct?

12 A. Yes, it's part of one of the bases.

13 Q. All right. And in addition to that, you cited
14 things such as switching costs and patient compliance.
15 Any other factors that I'm skipping?

16 A. Well, those aren't -- those aren't in
17 parallel. I mean, the first one is a factual basis,
18 and the second two are, you know, explanations of why
19 people behave the way they do. So, there are other
20 factors in the bases.

21 Q. Sir, isn't it true every branded product has
22 some market power or monopoly power within its brand?

23 A. I believe that every branded product has some
24 possibly trivial power over price, not necessarily
25 rising to the level of market power or monopoly power.

1 Q. Isn't it true, sir, that some products, some
2 branded products, be they pharmaceutical products or
3 consumer products, where there is heavy advertising and
4 marketing expense, there can be a premium brand
5 associated with a good? Isn't that something we
6 observe in our common daily experience?

7 A. Yes, that's right.

8 Q. Let me show you a concrete example. I'm going
9 to hand you -- if I may, Your Honor?

10 JUDGE CHAPPELL: You may.

11 (USX Exhibit Number 1017 was marked for
12 identification.)

13 BY MR. GIDLEY:

14 Q. I've handed you what we've marked simply for
15 identification purposes USX 1017, Professor Bresnahan,
16 and what we did on January 23rd was go to our CVS here
17 in Washington and purchase 100 tablets of Bayer Aspirin
18 and 100 tablets of the store brand CVS aspirin. Do you
19 see that?

20 A. I do.

21 Q. And there's a pretty sizeable pricing
22 difference, by my calculation 66 percent between the
23 generic, which we got for \$1.99, and the branded price
24 of \$5.89. We have calculated that as 66 percent. Do
25 you see that?

1 A. Yes.

2 Q. Now, sir, would that -- and let's say that we
3 could demonstrate that there had been a persistent
4 pricing difference between generic aspirin, store brand
5 aspirin, and Bayer Aspirin. Would that lead you to
6 conclude that Bayer Aspirin is in a product market by
7 itself?

8 A. No, not that alone.

9 Q. What else would you study?

10 A. The -- I would -- I would study the --
11 depending on what the factual circumstances of the
12 aspirin market are, I would also need to know something
13 about the sales of the -- of the brand name, and it
14 would be particularly useful to know what would happen
15 if there were a large change in the -- in the supply
16 of say either the CVS aspirin products or something
17 else.

18 Q. So, for instance, if for two months Bayer
19 couldn't produce aspirin and we observed a change in
20 the demand for the generic aspirin, that might be
21 evidence that you'd look to, if there was a natural
22 experiment like that?

23 A. Yeah, I don't -- a "natural experiment," as
24 you may know, is a phrase in economics which means more
25 than it sounds like it means, but I -- but I -- but

1 that religious war aside, if there were a shift to the
2 supply curve of -- of one of these products that was
3 substantial, that would be -- that would be very
4 helpful in learning about market power or its absence
5 among the others.

6 Q. Have you studied the trend of K-Dur pricing
7 since September 1, 2001?

8 A. No, I have not.

9 MR. GIDLEY: May I approach?

10 JUDGE CHAPPELL: Yes.

11 (USX Exhibit Number 1018 was marked for
12 identification.)

13 BY MR. GIDLEY:

14 Q. Professor Bresnahan, this weekend, after your
15 direct, I went to Rite Aid and asked the pharmacist
16 what potassium chloride products they had, and I made
17 my inquiry in particular about K-Dur 10 -- 20, excuse
18 me, mEq, and I basically did a price check at the
19 pharmacy, and I went in and said I had an older
20 relative who needed some potassium and what could you
21 give me for either K-Dur 20 or some generic substitute,
22 and this is what printed off the Rite Aid computer.

23 And again, I'm just marking this for
24 identification purposes, but the prices I was quoted by
25 Rite Aid were a retail price of \$60.99 for the K-Dur

1 and Klor Con M20 as a substitute drug at \$40.99. Do
2 you see that?

3 A. I do.

4 Q. And the savings that the pharmacist said I
5 would realize as a cash purchaser -- this wasn't with
6 any co-pays, this is just a walk-up transaction --
7 that, you know, to a cash-paying prescriber on this
8 date, the difference was \$20. Do you see that?

9 A. Yes, if I understand the page you gave me, the
10 difference in retail was \$20.

11 Q. All right. And sir, isn't it the case that
12 that's more than a 30 percent price difference between
13 the Upsher-Smith Klor Con M20 tablet and K-Dur 20 mEq,
14 wouldn't you agree?

15 A. Yes, I think so.

16 Q. I would be happy for you to calculate it, but
17 it's a substantial price difference, is it not?

18 A. Yes.

19 Q. And what do you ascribe that price difference
20 to?

21 A. The lower price entry of Upsher-Smith.

22 Q. All right. But is the K-Dur 20 mEq, is it in
23 its own product market even today because of that price
24 difference?

25 A. The -- no, not necessarily.

1 Q. Well, what's your best take on this kind of
2 economic evidence? I know it's just one data point,
3 but do you think it's in its own product market or not
4 --

5 A. No, I think --

6 Q. -- today?

7 A. -- it's just suffered entry, which has -- into
8 its market.

9 Q. Its lost market share in sales to the Klor Con
10 M20. Is that correct?

11 A. Yes, in both unit and dollar sales.

12 Q. And because of that trade-off in sales, you
13 conclude that they're in the same product market. Is
14 that correct?

15 A. The -- in -- well, not just because of that,
16 but in the particular context, that is -- I mean, the
17 -- there's a big shift in supply of Klor Con M20, that
18 is to say, they entered. That's a big increase in the
19 supply of that product, and it -- it draws very
20 substantial sales from K-Dur. That -- it's that part
21 which -- you know, which completes the argument for
22 me.

23 Q. So, the loss of sales, despite the fact that
24 there's still a large price difference, that would be
25 your rationale for saying that Klor Con M20 and K-Dur

1 20 mEq today are in the same product market. Is that
2 correct?

3 A. Yes, that the -- that the -- it's -- the loss
4 of sales is competition from Klor Con M20 or caused by
5 competition, I guess I should say, from Klor Con M20.

6 MR. GIDLEY: May I approach, Your Honor?

7 JUDGE CHAPPELL: Yes.

8 BY MR. GIDLEY:

9 Q. Professor Bresnahan, I've handed you USX 778,
10 and we talked about this exhibit at your deposition,
11 didn't we?

12 A. Yes.

13 Q. And I was going through with you scenarios had
14 the June 17, 1997 settlement agreement not been entered
15 into, and so this slide is entitled, just a
16 demonstrative, and we will mark it -- we have already
17 marked it USX 778, and it's entitled Patent
18 Infringement Litigation, Outcomes of SP versus US,
19 Schering-Plough versus Upsher-Smith.

20 A. Yes.

21 Q. And we're back in the '743 patent infringement
22 litigation, right?

23 A. Yes.

24 Q. One possible outcome is what occurred; that is,
25 the June 17, 1997 settlement agreement, correct?

1 A. Yes.

2 Q. Now, another scenario is the first scenario
3 that there is full litigation, correct?

4 A. Yes, meaning no settlement ever, as I
5 understand it.

6 Q. Right. Now, for full litigation to occur, you
7 need Upsher-Smith to continue litigating, correct?

8 A. Yes.

9 Q. And that's not something you've modeled,
10 whether they'd be able to afford or whether it would
11 have been economically rational for them to continue
12 the litigation past June 1997, correct?

13 A. No, I don't know whether it would be in their
14 interest to continue.

15 Q. Now, Roman numeral III would be another
16 settlement, and that would be some other settlement
17 agreement. Isn't it the case, sir, that any
18 Schering-Plough/Upsher-Smith settlement agreement as to
19 this product would have triggered the 180-day
20 exclusivity?

21 A. I -- any settlement? Well, would have
22 triggered it as much as this one did. My understanding
23 is that was uncertain at the time.

24 Q. All right, but the way the law eventually got
25 settled in 1998 or 1999, at some point in time, the

1 courts hashed out this business of whether a settlement
2 agreement was the same thing as a successful defense
3 requirement under the Hatch-Waxman Act, correct?

4 A. Yes.

5 Q. All right. And had my client entered into an
6 agreement that just agreed on the entry date, there's
7 no side payment, just an agreement as of June 17, 1997
8 without a side payment, it would have triggered the
9 same 180 days, would it not?

10 A. Yes, it would have -- it would have had -- it
11 would have triggered the 180 days under the same
12 contingencies.

13 Q. Now, I've listened to your testimony, but I'm
14 not sure I'm clear. You don't care for the June 17,
15 1997 settlement agreement. You believe it's
16 anti-competitive, correct?

17 A. That's correct.

18 Q. What is the scenario that you think should have
19 occurred in this case?

20 A. The -- either settlement with -- just for
21 time or litigation. I don't have a view between those
22 two, in particular because I don't know whether the --
23 whether the parties could have settled the lawsuit
24 without a payment.

25 Q. As you're sitting here today, you don't know

1 whether there was another settlement that the parties
2 could have agreed to. Isn't that correct?

3 A. Right, that's correct.

4 MR. GIDLEY: May I approach, Your Honor?

5 JUDGE CHAPPELL: Yes.

6 BY MR. GIDLEY:

7 Q. I've just handed you, Professor Bresnahan, an
8 exhibit we'll mark solely for identification purposes
9 USX 1019.

10 (USX Exhibit Number 1019 was marked for
11 identification.)

12 BY MR. GIDLEY:

13 Q. Professor Bresnahan, this is an attempt to
14 graphically depict a question and answer that I asked
15 you at your deposition. Let's assume for the moment
16 that the net present value of the payments, the three
17 payments in this case, is \$54 million. If you like, we
18 can assume it's \$54.5 million, and we have got that on
19 the right-hand side.

20 A. I'm with you.

21 Q. That's the blue bar. Do you see that?

22 A. Yes.

23 Q. If the net present value in June of 1997 of the
24 six products licensed to Schering-Plough was \$80
25 million net of any payments, milestone payments,

1 whatever the assumptions were, then the net positive
2 value calculation in your third part of the test would
3 be met, correct?

4 A. If the -- you know, if -- if -- you've
5 changed the hypothetical a little bit. I think if
6 there are some other payments under -- royalty
7 payments on something?

8 Q. No, I'm talking about the net present value.
9 In other words, there's a spreadsheet, and let's say
10 they make -- they -- the assumption on the
11 spreadsheet is they sell in ten countries, maybe they
12 have to make milestone payments.

13 A. Right.

14 Q. But net --

15 A. Net of --

16 Q. -- net of --

17 A. -- net of those milestone dates?

18 Q. Let me finish the question, if I could.

19 A. Okay.

20 Q. Net of all the payments, Schering-Plough
21 believes that it's getting \$80 million of net present
22 value.

23 A. But -- but -- so, I don't understand that in
24 the context of this -- of this contract. The -- the
25 -- there's other payments other than the \$54

1 million -- if Niacor works out, there's other
2 payments.

3 Q. Right, and they're calculated in this \$80
4 million.

5 A. Oh, they're -- they're not calculated here as
6 payments; they're calculated as -- they're calculated
7 as --

8 Q. Subtractions off of the orange bar.

9 A. -- subtractions.

10 Q. Right.

11 A. And there's some -- well, see, we've got
12 certain money on the right and uncertain money on the
13 left, if I understand the hypothetical.

14 Q. I'm just trying to figure out how the net
15 positive value calculation works. We're sitting down
16 at the settlement table, and we have the Bresnahan test
17 in front of us, and the Schering-Plough people come
18 back and say, even if we have to make some milestone
19 payments or whatever, this thing's worth \$80 million.
20 That's well above these payments, that is, the \$54.5
21 million.

22 A. Yes.

23 Q. All right? So, there is no net positive value,
24 correct?

25 A. You got soft again on me.

1 I'm sorry, would you read it back?

2 (The record was read as follows:)

3 "QUESTION: I'm just trying to figure out how
4 the net positive value calculation works. We're
5 sitting down at the settlement table, and we have the
6 Bresnahan test in front of us, and the Schering-Plough
7 people come back and say, even if we have to make some
8 milestone payments or whatever, this thing's worth \$80
9 million. That's well above these payments, that is,
10 the \$54.5 million.

11 "ANSWER: Yes.

12 "QUESTION: All right? So, there is no net
13 positive value, correct?"

14 THE WITNESS: If I under -- I really -- I'm
15 not sure I'm understanding. The -- if there is -- if
16 there is an expected -- because of the uncertainties
17 on the yellow side, calculation of the expected net
18 present value that justifies the uncontingent payment
19 on the right as -- you know, which is -- which is not
20 subject to those uncertainties, then it -- you know,
21 then and if Schering had made that calculation that it
22 was getting the equivalent of, you know, not only its
23 milestone payments and its royalties in expectation, I
24 mean, the -- you know, the -- there's a -- there's
25 the -- I then -- there isn't any net positive value.

1 There's still no explanation of the uncontingent form
2 of the -- of the -- of the payment.

3 So, the uncontingent form seems to me to be,
4 you know, troubling here, but if, you know, if it were
5 the way that business people in this business
6 ordinarily thought about these things, you know, I make
7 an uncontingent payment, when I make that expected
8 value calculation, yeah, then I would say there was no
9 net positive value. No, it's not.

10 BY MR. GIDLEY:

11 Q. Let me try to ask it one more time, try to
12 simplify the assumptions. Let's assume on the blue bar
13 we have all payments that are expected to be made to
14 Upsher-Smith, including milestone payments, and the net
15 present value of that is \$54 million.

16 A. But -- okay, so that's not this contract.

17 Q. Right, I'm on a hypothetical question.

18 A. Okay.

19 Q. The blue bar adds up to \$54 million. It's late
20 at night, we're trying to settle a case using the
21 Bresnahan test. Schering-Plough goes off into a room
22 and comes back and says we've run assumption after
23 assumption, scenario after scenario, our median
24 expectation honestly is \$80 million.

25 Isn't this a relatively simple case where the

1 Bresnahan test is not met in the sense that there's no
2 net positive value going to Upsher-Smith, and this
3 agreement is clearly not anti-competitive? Isn't that
4 the way to apply your test?

5 A. The -- no, not necessarily, although it's
6 close. The -- the -- you know, the factual
7 foundation that you've given me is that the Schering
8 people say -- it's the Schering's-eye view, the
9 Schering people say, yeah, I've run the numbers, and it
10 looks like it's worth that to me. The -- you know,
11 that -- that's -- that's different from, you know, a
12 cold business judgment in a stand-alone way which would
13 justify paying the \$54 million up front. But except
14 for that, you know, if they were comparable according
15 to the way people usually do business, then I'd say
16 yes.

17 Q. In other words, an agreement with the value on
18 both sides represented by these orange and blue bars
19 would not be anti-competitive as a side payment, as a
20 side deal on licensing. Is that correct?

21 A. Not if the values were calculated the way
22 people calculate -- you know, not if it were the way
23 people decide to enter into contracts in the ordinary
24 course of business in this industry. The existence of
25 a -- of a spreadsheet is -- isn't the same as the way

1 people value business opportunities, but other than
2 that, yes.

3 Q. I'm sorry, so, there has to be an ordinary
4 course determination of net present value? I didn't
5 see that in the language of the Bresnahan rule at page
6 22.

7 A. No.

8 Q. It's not there, is it, sir?

9 A. No, there has -- there has to be a market
10 alternative calculation, a calculation based on the
11 lights of the business people as they do it.

12 Q. Well, this is intellectual property, sir, and
13 ordinarily, there isn't a comparable of these six
14 products. Wouldn't you agree? These are individual
15 pharmaceutical products, each one has their own
16 potential, their own future marketing potential,
17 they're somewhat unique, aren't they, sir?

18 A. I'm sure they're somewhat unique.

19 Q. All right. Now, you testified earlier that
20 Niaspan was comparable to Niacor-SR. Isn't that
21 correct?

22 A. That's correct.

23 Q. Is it your testimony that we could use Niaspan,
24 the Kos product, as a market test for Niacor-SR?

25 A. Well, as a -- as a -- I don't know about as a

1 market test, but as a -- I used it in my revealed
2 preference test.

3 Q. Right, but I'm asking you, could you do a
4 market test? You could say we're standing here in June
5 1997, the company's just gone public, they're a single
6 drug company, and they have a niacin product, and the
7 product's comparable to Niacor-SR. Couldn't we make a
8 market test based on the trading in those public shares
9 versus the Niaspan -- of the Niaspan product versus
10 Niacor-SR? I know that you didn't do that, but
11 couldn't someone do that?

12 A. You -- you'd have to be careful about the
13 inequalities. You'd want to show that Niacor-SR in
14 Europe, et cetera, was -- was no weaker an opportunity
15 than Niaspan, you know, with however the market was
16 attributing to Kos the value of that, which I take it
17 would be worldwide.

18 Q. But you could make the comparison with some
19 adjustments, couldn't you, sir?

20 A. Well, if -- if the -- if you were to make the
21 appropriate -- if the inequalities went the right way,
22 which I don't believe they did in this case, you could
23 make that comparison.

24 MR. GIDLEY: May I approach, Your Honor?

25 JUDGE CHAPPELL: Yes.

1 (USX Exhibit Number 1020 was marked for
2 identification.)

3 BY MR. GIDLEY:

4 Q. Professor Bresnahan, I'm going to try another
5 example and see if we can learn a little more about the
6 Bresnahan test.

7 If as of June 1997 the net present value of the
8 bundle of payments coming to Upsher-Smith was in the
9 range of \$53 to \$55 million in net present value -- do
10 you see that on the right-hand side?

11 A. Yes.

12 Q. And on the left-hand side, the value that
13 Schering-Plough is getting from the transaction taken
14 as a whole is \$51 million. So, they're very close, but
15 it's just a little bit of a situation where there's
16 some net positive value to Upsher-Smith, but it's not
17 very much. Do you see that?

18 A. I do.

19 Q. Now, sir, under the Bresnahan test, do you have
20 a de minimus sort of exception where you're not going
21 to consider very, you know, trivial, 1 or 2 or 5
22 percent mis-estimations by the parties as violating the
23 Bresnahan test?

24 A. Well, the -- the estimations by the parties,
25 again, the spreadsheet estimations don't play a

1 particularly central role in my test, but the -- the
2 -- and the -- it seems to me it would be hard to get
3 this -- this hypothetical probably doesn't want the
4 words Schering-Plough and Upsher-Smith in it, but
5 otherwise, I think the logic of it seems to me to be
6 right.

7 If there were -- you know, if there were a
8 market transaction that was approximately a wash, you
9 know, within these kind of numbers, I would -- I would
10 say that that was payment of net consideration.

11 Q. Okay. You don't have that de minimus exception
12 in there, but you think that's something reasonable to
13 consider, don't you, sir?

14 A. I do.

15 Q. All right. Let me put back on the ELMO so it's
16 on your screen -- Professor, can you read that, Test
17 Criteria?

18 A. Yes, I can.

19 Q. And for the record, I'm showing you page 22 of
20 your report.

21 A. Yes.

22 Q. And sir, you were telling me a minute ago that
23 the mere existence of a spreadsheet would not be
24 sufficient to establish the honest beliefs of
25 Schering-Plough. Was that the position you were

1 taking? Did I understand you correctly?

2 A. No, I mean, I -- you know, they -- we
3 discussed, you know, honest -- "honest" isn't an
4 economic word. I mean, we've had this discussion
5 earlier. So, no, that's not what I said.

6 Q. Okay. What does Schering-Plough have to do to
7 calculate net positive value so that it's safe in doing
8 the side licensing deal? Can you just give me an
9 example?

10 A. Oh, there's an easy way. Just split the deals,
11 as I -- as I told you in my deposition.

12 Q. You mean have two separate deals?

13 A. Yes, with a -- with appropriate provisions for
14 backup.

15 Q. So, you could literally settle the litigation
16 one week and a week or two later you could come back
17 and do the licensing agreement, and that would meet the
18 Bresnahan test?

19 A. I think if the -- if the branded firm can walk
20 away from the patent settlement and the -- no, I'm
21 sorry, I started it the wrong way. I have got it
22 twisted in my head. Let me start again.

23 If the branded firm can walk away from the
24 licenses and the generic entrant can walk away from the
25 patent settlement, then I would -- I would say that

1 there was no linkage of the -- of any net value in the
2 license agreement to the -- to the patent settlement.

3 Q. And the two transactions could be separated by
4 as short a period of time as a week or ten days?

5 A. It isn't the -- I don't think it's the time
6 that's critical.

7 Q. I'm just trying to understand the test. If it
8 were separated by ten days, the licensing deal was ten
9 days later from the entry date agreement, then you'd be
10 happy?

11 A. It doesn't have anything to do with the time.

12 Q. I'm just trying to apply your test. You told
13 me that you can do two separate transactions. How many
14 days do I have to separate between the two
15 transactions, or do you know?

16 A. Does -- no.

17 Q. You don't know?

18 A. No. It has nothing to do with days.

19 Q. What does it take to do two separate
20 transactions? It's 11:00 at night, we're very tired,
21 we're trying to apply your test, and somebody says in
22 the conference room we can have two separate deals.
23 How do we go from there?

24 A. The -- it isn't the time. It's the , as I
25 said a moment ago, the opportunity of the -- of the

1 branded firm to walk away from the licenses and of the
2 generic firm to walk away from the settlement. If they
3 -- if they have that, then I would say that there are
4 -- that you couldn't argue that there was a linkage of
5 any payment in the license contract for settlement of
6 the litigation.

7 Q. Now, let's say life isn't so simple and the
8 parties say we want one global deal tonight and we want
9 to get this settled. Are you telling me that
10 Schering-Plough needs to do some kind of ordinary
11 course of business assessment of the licensing in order
12 to be safe with this valuation calculation, sir?

13 A. In order to be safe? The -- the -- I would
14 -- you asked me this question in deposition, and --
15 and I answered it as I just answered it. If you wanted
16 to be safe, the thing to do would be break the linkage.

17 Q. So, can you sitting here today tell me of one
18 transaction that Upsher-Smith and Schering-Plough could
19 have entered into in a single, global transaction that
20 would have, you know, readily satisfied the Bresnahan
21 test, in one, single, integrated agreement?

22 A. No, I can't. If it -- if it had both of the
23 elements in it, no.

24 Q. How many patent infringement settlement
25 agreements that have been consummated have you read,

1 sir?

2 A. That have been consummated, these two.

3 Q. And "these two" would refer to the ESI
4 agreement and the Upsher-Smith agreement. Is that
5 correct?

6 A. That's correct.

7 Q. You've never ever read another patent
8 infringement settlement agreement outside the confines
9 of this case. Is that correct?

10 A. Not that was consummated.

11 Q. All right. You haven't read a consummated
12 patent infringement settlement agreement other than the
13 two that were in this case. Isn't that the case, sir?

14 A. That's correct.

15 Q. Now, sir, we've sparred a little bit today and
16 yesterday about the Bresnahan rule versus the Bresnahan
17 test. Let me start with your language.

18 The Bresnahan test is the language you use in
19 your report, correct?

20 A. Well, it's in my report, and I call it a test,
21 so yes.

22 Q. And you are Professor Bresnahan.

23 A. I sure am.

24 Q. So, it's the Professor Bresnahan test.

25 A. Yes.

1 Q. Now, the Professor Bresnahan test is a matter
2 of economics; it's not a matter of law. Is that
3 correct?

4 A. That's absolutely right.

5 Q. All right. But if we met the Bresnahan test,
6 you wouldn't argue that the agreement is
7 anti-competitive. Is that correct?

8 A. If I understand what you mean by "met," yes.

9 Q. In other words, if we didn't have net positive
10 value going to Upsher-Smith, you wouldn't argue that
11 the patent infringement settlement agreement in this
12 case was anti-competitive, correct?

13 A. Right.

14 Q. All right. Now, when I use the word "rule,"
15 are you concerned that I'm talking about a policy as
16 opposed to an economics test?

17 A. Yes, in particular when you used that in my
18 deposition, I thought you might have meant something
19 that was a policy, perhaps even more abbreviated than
20 this.

21 Q. And sir, as I recall your deposition, didn't
22 you tell me -- we had a colloquy about whether or not
23 if the Commission took the words on page 22, the
24 Federal Trade Commissioners, and made that into a rule
25 that was in the Federal Register, I asked you whether

1 you thought that the Bresnahan test -- now it's a
2 rule, it's going to be a rulemaking by the Federal
3 Trade Commission -- and you testified that it's not
4 ready for the five Federal Trade Commissioners to enact
5 it as a rule, correct, sir?

6 MR. KADES: Objection, Your Honor, relevance.
7 This is not a rulemaking procedure.

8 MR. GIDLEY: Your Honor, it tests directly
9 whether or not this test is ready for any kind of
10 policy-making determination, most assuredly one like
11 this where my client is being accused of an
12 anti-competitive agreement.

13 MR. KADES: Your Honor, this is not a
14 policy-making forum. What the issue here is is whether
15 these two agreements are anti-competitive, not whether
16 what -- and Professor Bresnahan's opinion as to
17 whether these agreements -- whether his analysis is
18 appropriate for policy is totally separate from whether
19 these agreements are anti-competitive.

20 MR. GIDLEY: Your Honor, it goes to whether or
21 not this witness has the sufficient confidence, based
22 on his highly limited empirical experience in the area
23 of patent infringement settlement agreements, with the
24 test.

25 JUDGE CHAPPELL: I am going to overrule the

1 objection. I am going to allow the line of questioning
2 only insofar as you're demonstrating the expert's
3 belief in the strength of his own test.

4 BY MR. GIDLEY:

5 Q. Professor Bresnahan, you have no current
6 intention of publishing the Bresnahan test. Isn't that
7 correct?

8 A. That's correct.

9 Q. And sir, you're concerned that if this were a
10 rule of law that was enacted right now, that we don't
11 have sufficient empirical experience with, you know, a
12 number of these patent infringement settlement
13 agreements to codify the rule into positive law. Isn't
14 that your testimony?

15 A. That -- that's not quite right. I mean, the
16 -- and I guess I would say that an abbreviated rule
17 which condemned any settlement with a -- with a
18 reverse payment, I would -- before I would advise that
19 as a policy rule more generally, as I told you in my
20 deposition, I would want to investigate whether reverse
21 payments, large payments to the injuring party, are --
22 are common.

23 Q. We have very limited empirical experience in
24 this area. Isn't that correct, Professor?

25 A. Well, the -- in the -- I don't -- I don't

1 know of any evidence that large payments to the
2 injuring party are common. You know, you asked me
3 whether I would undertake such an empirical
4 investigation for publication. I said no because I
5 think, you know, for scientific purposes, you'd be
6 pretty likely to find out that they were not common and
7 thereby not surprise anybody. But I don't think that
8 the law and economics literature has -- has
9 investigated that in the context of patent settlements.

10 Q. The question, sir, is we have a limited
11 empirical experience with reverse payments. Isn't that
12 the case sitting here today?

13 A. Yes.

14 Q. We do not have empirical experience sitting
15 here today on the pros or cons of adopting your
16 three-part test as a rule to govern reverse payments.
17 Isn't that the case?

18 A. You know, it's -- there I don't know what you
19 mean. I mean, if it were a test that were used in the
20 economics in lawsuits, that's one thing. If it were
21 some rule adopted by the FTC, I would imagine that's
22 more abbreviated.

23 Q. Sir, isn't it the case that we have a limited
24 empirical experience with the pros and cons of the
25 application of your three-part test?

1 A. In the narrow confines of patent settlements, I
2 think that's right. More generally, in the context of
3 agreements between competitors, I think that's wrong.

4 Q. But in the application to patent infringement
5 settlement agreements, we have limited experience on
6 the pros and cons of the Bresnahan test. Isn't that
7 correct?

8 A. In -- within that area, we have limited
9 experience with this. The -- the part -- the general
10 part is that it's a bad idea for firms to pay people
11 not to compete with them. We have -- I think we have
12 a very solid empirical foundation for that.

13 Q. But we have no empirical foundation for trying
14 to apply the third part of your test. Isn't that
15 correct? We have never tried to make a net positive
16 value determination in any particular case. Isn't that
17 correct, sir?

18 JUDGE CHAPPELL: Mr. Gidley, you just asked him
19 two questions. Let's get one at a time. So, why don't
20 you repeat one of those questions.

21 MR. GIDLEY: Very good, Your Honor.

22 BY MR. GIDLEY:

23 Q. The first question: We have no empirical
24 experience, Professor Bresnahan, in applying the third
25 part of your test. Isn't that correct?

1 A. No, I think there are contexts in which there
2 are agreements between competitors in which something
3 is paid, not in -- not in pharmaceutical patent
4 settlements, no.

5 Q. All right. In the pharmaceutical patent
6 settlement area, we have no empirical experience in
7 applying the third part of your test. Isn't that
8 correct?

9 A. That's correct. The -- there is -- we don't
10 know whether in this particular context it would be
11 common for the injuring party to be paid.

12 Q. Sir, you have not tried to analyze the intent
13 of Upsher-Smith in this case. Isn't that correct?

14 A. No, not in a -- not in a psychological sense,
15 I have analyzed their incentives.

16 Q. But you haven't attempted to analyze the actual
17 intent of the factual -- strike -- the business
18 people from Upsher-Smith. Isn't that correct?

19 A. No, other than -- other than their incentives
20 and acting on them, no.

21 Q. All right. And the same for Schering-Plough,
22 you haven't tried to analyze the intent of any
23 particular Schering-Plough executive. Is that correct?

24 A. No, in the same sense.

25 Q. Professor Bresnahan, have you considered in

1 applying the Bresnahan test what to do about reasonable
2 attorneys' fees? Have you considered that question
3 with respect to the Bresnahan test?

4 A. You mean -- I'm not sure what you mean.
5 Reasonable attorneys' fees in the patent litigation or
6 --

7 Q. Yes.

8 A. Yes.

9 Q. And what do we do about reasonable attorneys'
10 fees? They're awarded by statute in patent cases, are
11 they not?

12 A. I don't -- I don't know that about patent
13 cases in specific. I assume that attorneys' fees are
14 sometimes awarded in lawsuits.

15 MR. GIDLEY: May I approach, Your Honor?

16 JUDGE CHAPPELL: Yes.

17 (USX Exhibit Number 1021 was marked for
18 identification.)

19 BY MR. GIDLEY:

20 Q. Professor Bresnahan, I'm going to ask you to
21 refer to the next exhibit which has been marked for
22 identification purposes as 1021, and it is a copy of an
23 excerpt from the United States Code, Annotated, which
24 is familiar to some of the people in this room.
25 Section 285 of that code, sir, provides for attorneys'

1 fees in certain infringement actions, and the legal
2 formula is, "The Court in exceptional cases may award
3 reasonable attorney fees to the prevailing party."

4 Do you see that language?

5 A. I do.

6 Q. In applying the Bresnahan test where all that's
7 being settled is the entry date and the generic says,
8 hey, I'm out a million bucks, and I thought I had a
9 good case, and I think I would get some attorneys'
10 fees, how would we value the word "reasonable
11 attorneys' fees" in such a simple case?

12 A. The -- if the -- you know, if that party in
13 the litigation had some probability of winning,
14 then -- and if whatever the test for exceptional cases
15 is is satisfied, so I would say that there are those
16 two probabilities, the probability that they win and
17 the probability that the exceptional cases thing is
18 satisfied, then I would multiply those two
19 possibilities together, assuming -- well, I would
20 calculate the probability of those two events
21 happening, which might not be the product of the two
22 probabilities, because they might not be independent,
23 but the probability of the -- that they win and they
24 -- the exceptional cases, whatever that is, is
25 satisfied.

1 And then I would -- I would multiply that by
2 the -- I think you said a million dollars. If the
3 million dollars is the -- goes with the concept of
4 reasonable attorneys' fees as the court would see it, I
5 would multiply that probability by it.

6 Q. I just want to make sure the hypothetical is
7 clear. We're only agreeing on entry date. The only
8 other term is attorneys' fees, and the entrant says,
9 hey, I've got a million dollars in attorneys' fees, I
10 think they're reasonable. Does the generic firm need
11 to hire an expert witness or an independent valuation
12 expert to be safe that they haven't run afoul of the
13 Bresnahan test?

14 A. I'm sorry, I must have missed part of your
15 hypothetical.

16 Q. Well, we need to avoid net positive value going
17 to the generic. The generic firm says, I have a
18 statutory right to get my reasonable attorneys' fees,
19 and I think exceptional circumstances were proven, and
20 the branded firm with more lawyers says, wow, this is
21 really risky, because, you know, something's happened
22 and somebody's actually adopted the Bresnahan test.

23 The night before the settlement, how do we get
24 over that? Do we have to hire an independent expert
25 who is willing to certify that the fees are reasonable

1 to avoid the inference of net positive value?

2 A. I -- Mr. Gidley, I'm lost in an earlier
3 statement. They're paid -- what's the form of the
4 settlement contract here?

5 Q. We just have a settlement on entry date.

6 A. Yeah.

7 Q. That's not anti-competitive, right?

8 A. Right.

9 Q. No side licensing deal.

10 A. Right.

11 Q. Are you with me?

12 A. With you so far.

13 Q. All right. The generic says, wow, I'm out a
14 million dollars. I think they're reasonable fees and
15 the exceptional circumstances in the statute are met.
16 I want my million dollars. The branded responds, wait
17 a minute, I'm afraid even if I agreed with your
18 calculation that we need something to get us over the
19 hump so we haven't violated the Bresnahan test of net
20 positive value. I don't want to overpay you in paying
21 you your reasonable attorneys' fees.

22 How do the parties settle that practically in
23 the real world, sir?

24 A. The -- the -- if they -- you know, if they
25 calculate -- if they can agree that it's a certainty,

1 if I understand the hypothetical, if they can agree
2 that it's a certainty that the exceptional
3 circumstances or whatever it is -- exceptional cases
4 thing is satisfied, then, you know, what I would -- I
5 guess I would say that the probability that the --
6 that the generic was going to prevail ought to be
7 multiplied by the attorneys' fees, and then, you know,
8 the -- I guess I need to assume also that the -- that
9 there weren't going to be any reasonable attorneys'
10 fees going the other way should the -- the other
11 party, the brand, have prevailed, then I guess I would
12 say that's -- that's not a net positive value.

13 Q. But if we want to be sure that we don't have
14 net positive value -- and let's assume we don't agree
15 about anything. The generic has his position, and the
16 branded firm says, we're really worried, we're risk
17 averse or whatever, and we want to in good faith comply
18 with this new Bresnahan test, so we're talking about a
19 settlement down the road, the Bresnahan test has been
20 adopted somewhere.

21 A. Yes.

22 Q. I don't understand what we need to do the night
23 before signing the settlement agreement to get over
24 this issue when we don't agree on any issue in the
25 case.

1 A. I guess I'd say if -- if both parties, say,
2 think they're going to be awarded attorneys' fees,
3 that's -- that's a -- that's a reverse of the usual
4 assumption in the economics of settling litigation.
5 The usual assumption is that, as we were talking about
6 earlier, that the meaning of attorneys' fees, the costs
7 of the litigation that you would pay if going forward,
8 are a cost of litigation.

9 Here, if -- that -- that's reduced if, say,
10 both sides think they're going to be awarded their
11 fees, and that typically would -- that will make it
12 harder to reach a settlement if they -- if there's not
13 -- if they don't see there as being costs of -- fees.
14 So, if they can't agree on it, it makes it harder to
15 reach a settlement.

16 Q. The problem in the real world is one party
17 might say you had three people at the deposition, you
18 should have only had one, so I don't -- I dispute the
19 scope of the reasonable attorneys' fees. Let's assume
20 we have that kind of a problem.

21 A. Right.

22 Q. And we're trying to apply the Bresnahan test,
23 and we don't have a side license. Would you be
24 comfortable that the Bresnahan test is met if an
25 independent expert were retained by both firms and

1 concluded that the payment of the reasonable attorneys'
2 fees was, in fact, reasonable?

3 A. I don't see what the -- what the independent
4 -- I don't see what the independent expert has to do
5 with it. I mean, the -- the thing that's -- the
6 thing that's getting me here is how you get to it being
7 clear to the two parties that party A should pay
8 reasonable fees to party B even though they differ on
9 who's going to prevail in the litigation.

10 Q. Dr. Bresnahan, let's turn to another topic.

11 Dr. Bresnahan, I'm showing you what's been
12 marked by complaint counsel as CX 1584. Do you see
13 that?

14 A. I do.

15 Q. And this is a slide that was used on your
16 direct testimony.

17 A. Yes, it was.

18 Q. Now, sir, you -- did you assist in the
19 preparation of this slide?

20 A. I did.

21 Q. Now, as I understand the slide, the last line
22 in black says that four firms expressed interest in the
23 Niacor-SR license during Upsher-Smith's shopping of the
24 license back in the first several months of 1997. Is
25 that the way to read your slide?

1 A. Well, they -- they didn't all express interest
2 in the first several months, but they -- but there
3 were four firms that expressed interest as a result of
4 that shop.

5 Q. Well, as of June 17, 1997, is it your testimony
6 that only four firms had expressed interest in the
7 European licensing rights for Niacor-SR?

8 A. Well, that hadn't -- that hadn't rejected it
9 by that time.

10 Q. Only four firms, sir?

11 A. Yes.

12 Q. All right. What four firms had expressed
13 interest?

14 A. Lacer, Pierre Fabre, the Greek one, Nycomed
15 Hellas, and I made a list of them in an appendix to my
16 report, but I forget the fourth one.

17 Q. Why don't you take a look at your report, sir,
18 if you would. You can use it in the black exhibit
19 book, I think it's in there.

20 A. Okay. I'm sorry, can you remind me what
21 exhibit it is? Oh, I've got it. I've got it, thank
22 you.

23 Yes, thank you for bringing it up for me. The
24 fourth one is Intercon.

25 Q. And sir, you're making reference to Appendix

1 A18. Is that correct?

2 A. That's correct.

3 Q. And you didn't write Appendix A18; you only
4 supervised it. Is that correct?

5 A. That's correct.

6 Q. Now, sir, are you aware that as of June 17,
7 1997, that there were four additional firms that had
8 signed confidentiality agreements as of June 17, 1997?

9 A. Four firms not listed here?

10 Q. Yes, sir.

11 A. No, I'm not.

12 Q. All right. And those firms are Dr. Estev,
13 Servier, Searle and Pfizer, are they not, sir?

14 A. Certainly I don't recall Pfizer, but the --
15 the other three I believe had signed -- I recall had
16 signed nondisclosure agreements and participated.

17 Q. But sir, just so I'm very careful here, you say
18 four firms expressed some interest. That's under A18,
19 correct?

20 A. Right.

21 Q. Sir, I'm asking you, isn't it the case that as
22 of June 1997, four additional firms had expressed an
23 interest in the Niacor-SR product, Dr. Estev, Servier,
24 Searle and Pfizer, signing confidentiality agreements,
25 sir? Isn't that the case?

1 A. Yes, though my understanding is that they
2 rejected it.

3 Q. But don't you think signing a confidentiality
4 agreement is the expression of some interest?

5 A. Yes, at an early stage.

6 Q. All right. So, instead of four, the number of
7 firms that expressed some interest, which is the
8 heading for Exhibit A18, is actually eight, sir, is it
9 not, as of June 17, 1997?

10 A. The -- the -- I don't know that that's right.
11 I mean, the -- the three of those that I recall
12 rejected the product ultimately.

13 Q. I'm not asking ultimately. I'm asking as of
14 June 17, 1997, and isn't it the case that Dr. Estev,
15 Servier, Searle and Pfizer had signed confidentiality
16 agreements prior to June 17, 1997? Isn't that the
17 case?

18 A. I think they certainly had signed
19 confidentiality agreements before that date.

20 Q. And prior to --

21 A. The three that I remember anyway.

22 Q. Excuse me.

23 Prior to June 17, 1997, isn't it the case that
24 three of those four additional firms, Dr. Estev,
25 Servier and Searle, had met either in Europe or in the

1 United States with Upsher-Smith in connection with the
2 Niacor-SR license? That would be Dr. Estev, Servier
3 and Searle. Isn't that correct?

4 A. Right, two in Europe and one in Chicago, as I
5 understand it.

6 Q. And don't you think those meetings is the
7 expression of some interest by those additional firms?

8 A. Yes.

9 Q. All right. Now, as I read Appendix A18, which
10 has ten firms as "incomplete," do you see that?

11 A. Yes.

12 Q. And that has converted in CX 1584 to "10 never
13 responded." Do you see that?

14 A. That's right.

15 Q. And the first firm that you have listed as
16 incomplete in A18 is Abbott Labs, is it not?

17 A. Yes.

18 Q. But isn't it the case, sir, that Abbott Labs
19 did respond?

20 A. You know, I -- I read the end of trail
21 documents on all of these, but I don't recall the
22 Abbott Labs one.

23 Q. Well, isn't it the case that prior to June 17,
24 1997, a ninth firm, Abbott Laboratories, had responded
25 to Upsher-Smith with respect to Niacor-SR?

1 A. I don't recall that, but I -- but I don't
2 recall the opposite either.

3 MR. GIDLEY: I'd like to mark this as the next
4 USX exhibit. I'll have the number in just a second,
5 Your Honor. It's 1022.

6 (USX Exhibit Number 1022 was marked for
7 identification.)

8 BY MR. GIDLEY:

9 Q. This is a memorandum on -- or a letter on
10 Abbott Laboratories letterhead.

11 May I approach, Your Honor?

12 JUDGE CHAPPELL: Yes.

13 BY MR. GIDLEY:

14 Q. This document is dated March 19, 1997, is it
15 not, Doctor?

16 A. Yes.

17 Q. And it states, "Thank you for your letters
18 dated January 31 and March 5. We are in the process of
19 evaluating the information you submitted; however, this
20 process normally takes 2-4 weeks (in some cases
21 longer)."

22 Do you see that?

23 A. I do.

24 Q. Is that a case of never responding to
25 Upsher-Smith, which is the case on slide CX 1584?

1 A. No, "incomplete" is a bad characterization.

2 Q. And certainly "never responded" would be an
3 inaccurate characterization of Abbott Laboratories,
4 would it not, sir?

5 A. I agree with that.

6 Q. Sir, you testified, as I understand it, in
7 direct about Pierre Fabre. Do you recall that?

8 A. I do.

9 Q. And are you aware, sir, that Pierre Fabre had
10 international pharmaceutical affiliates in 12 European
11 countries, including Belgium, Czech Republic, Germany,
12 Greece, Hungary, Italy, Poland, Portugal, Russia,
13 Spain, Switzerland and the United Kingdom? Were you
14 aware of that, sir?

15 A. No, I wasn't. I was recalling their letter to
16 Mr. Pettit which mentioned five countries and Ms.
17 O'Neill's discussion of the possibility of perhaps
18 three countries.

19 Q. Well, directing your attention to the O'Neill
20 deposition, didn't Vicki O'Neill testify in this very
21 case that for each country that Pierre Fabre would
22 license Niacor-SR, they were willing, based on the
23 meeting that had been held in Paris, to pay \$5 million
24 per country? Isn't that the case?

25 A. Yes, that's what she -- that's what she said

1 in her deposition, though her file memo about Pierre
2 Fabre talks about milestone payments instead.

3 Q. Now, you weren't at the meeting in Paris, were
4 you, sir?

5 A. That's correct.

6 Q. And so you do not believe the sworn testimony
7 of Vicki O'Neill, is that correct, which appears at
8 page 80 of her deposition?

9 A. I don't -- I don't believe it or disbelieve
10 it. I'm relying on the temporary document -- I'm
11 sorry, contemporaneous document.

12 Q. Well, it seems to me if you're not giving
13 Pierre Fabre \$5 million per country credit, you are
14 disbelieving her testimony at page 80, are you not,
15 sir?

16 A. I'm not relying on it.

17 Q. Sir, you testified that -- well, you're
18 disregarding it, aren't you, sir?

19 A. Yes.

20 Q. You testified on direct that you had a
21 conversation with Mr. David Pettit, did you not?

22 A. That's true.

23 Q. Mr. David Pettit is with Moreton, is he not?

24 A. Yes.

25 Q. And Moreton is located in the UK, are they not?

1 A. Yes.

2 Q. And Mr. David Pettit and the Moreton Company
3 had an engagement with Upsher-Smith, did they not?

4 A. Yes, they did.

5 Q. And the purpose of the engagement was to
6 market, prior to the Schering settlement, was to market
7 the Niacor-SR drug throughout Europe, correct?

8 A. Yes, that's my understanding.

9 Q. And that was necessary because there was no
10 sales force or detail people or market advertising
11 whatsoever outside of North America for the
12 Upsher-Smith Company, was there?

13 A. Well, I don't know about "necessary," but that
14 was in the interests of Upsher, that's my
15 understanding.

16 Q. And isn't it the case, sir, that you have never
17 before this case evaluated an international licensing
18 marketing effort? Isn't that the case?

19 A. That's right.

20 Q. Certainly not in the pharmaceutical industry,
21 correct?

22 A. Right.

23 Q. All right, sir. And you said that you had a
24 conversation in August with Mr. Pettit?

25 A. I think that's right.

1 Q. And you said in your direct testimony, as I
2 understood it, that Upsher-Smith was unlikely to get a
3 noncontingent payment, did you not?

4 A. Yes, that's what Mr. Pettit told me.

5 Q. And you based that on the one conversation with
6 Mr. Pettit?

7 A. Yes, also on his recommendation letter to --
8 or memo perhaps to Upsher.

9 Q. And you also testified that you thought
10 milestone payments would not be forthcoming for the
11 Niacor-SR product, did you not, based on the David
12 Pettit interview that you conducted? Did you not, sir?

13 A. I -- no, I'm not sure of that.

14 MR. GIDLEY: May I approach, Your Honor?

15 JUDGE CHAPPELL: Yes.

16 (USX Exhibit Number 1023 was marked for
17 identification.)

18 BY MR. GIDLEY:

19 Q. What's been marked as USX 1023 is a sworn
20 statement of Mr. David Pettit. In relevant part, let
21 me direct your attention to paragraph 17.

22 MR. KADES: Your Honor, I would object. We
23 never received this affidavit.

24 MR. GIDLEY: Your Honor, we have the statements
25 of an extrajudicial declarant that were raised on

1 direct. The only way to fight the statements of an
2 extrajudicial declarant are by the sworn testimony of
3 the extrajudicial declarant.

4 JUDGE CHAPPELL: What hearsay exception are you
5 advocating there, Counselor?

6 MR. GIDLEY: I'm not offering it for the truth
7 of the matter asserted. We have an expert witness
8 who's relying on hearsay to make a valuation opinion.
9 I am simply saying that his foundation is unreliable
10 based on my sworn statement of Mr. David Pettit, which
11 the witness does not have. I'm not offering it for the
12 truth of the matter asserted, Your Honor.

13 JUDGE CHAPPELL: If you don't care whether it's
14 true or not, then why are you going to question him
15 about the words within the document?

16 MR. GIDLEY: Because it contests the
17 conversation that this witness has already testified to
18 on direct, Your Honor, and my understanding of the only
19 hearsay exception for his direct testimony was the idea
20 or the notion that expert witnesses can testify based
21 on hearsay if that's within their scientific field of
22 endeavor and what's normally done.

23 JUDGE CHAPPELL: Based upon your representation
24 that it's not offered for the truth of the matter and
25 nothing substantive, I'm going to overrule the

1 objection and let you proceed, Counselor.

2 BY MR. GIDLEY:

3 Q. Mr. David Pettit says among other things in
4 paragraph 17, "I have no recollection whatsoever of
5 speculating as to the licensing terms which
6 Upsher-Smith may or may not have been able to negotiate
7 - my comments," referring to his conversation with you,
8 Professor Bresnahan, "related to examples of other
9 agreements that I had been involved in or which were
10 public knowledge."

11 Further, he says in paragraph 18, the last
12 sentence, "Indeed, it was not until my telephone
13 conversation with Mr. Curran," that's Chris Curran, "on
14 20th August 2001 that I became aware that the agreement
15 between Upsher-Smith and Schering-Plough Corporation
16 involved multiple products, most of which I am totally
17 unfamiliar with, or that the agreement covered
18 territories in addition to Europe."

19 Do you see that quote, sir?

20 MR. KADES: Objection, Your Honor. The only
21 purpose for this document is hearsay, and I don't see
22 how it's proper hearsay. I -- I'm sorry, it is
23 apparently impeachment, and I fail to see how this is
24 proper impeachment of any statement Professor Bresnahan
25 has made.

1 JUDGE CHAPPELL: So, are you objecting to it as
2 hearsay?

3 MR. KADES: I'm objecting to the -- I'm
4 objecting to this -- to the use of this document as
5 improper impeachment, which is the reason I believe Mr.
6 Gidley gave for wanting to use the document in the
7 first place.

8 JUDGE CHAPPELL: Do you have any reason to
9 believe that this is not a reliable document based on
10 the stamp on the front?

11 MR. KADES: No, I have no reason to believe
12 that, but this is a document that we just received
13 seconds ago. We have had no chance to review it. And
14 he's not set up an appropriate -- a proper
15 impeachment.

16 JUDGE CHAPPELL: We are going to take a break
17 off the record for about five minutes. Why don't you
18 look it over, Mr. Kades, and then I'll let you remake
19 your objection if you would like to.

20 MR. KADES: Thank you.

21 (A brief recess was taken.)

22 JUDGE CHAPPELL: We are back on the record.
23 Does the Government have an objection?

24 MR. KADES: Yes, Your Honor. Our objection is
25 we think it's fundamentally unfair that we just

1 received this affidavit from someone who is a
2 consultant for Upsher who's bound by a confidentiality
3 agreement with Upsher and who has signed this over a
4 week ago, and by springing it on us at this point,
5 there is no ability for us to try to talk to Mr.
6 Pettit, as we would normally do in cases where we
7 receive opposing affidavits.

8 JUDGE CHAPPELL: If I understood respondent's
9 counsel, he said -- he indicated this was going to be
10 used to cross examine the Professor, not to be offered
11 into evidence.

12 MR. KADES: Yes, Your Honor, but depending on
13 how the cross examination goes, it would be conceivable
14 that we would rely on -- that we might obtain a
15 statement from Mr. Pettit as well to undermine the
16 cross examination.

17 JUDGE CHAPPELL: Okay, we have an objection.
18 What's your basis for offering this exhibit?

19 MR. GIDLEY: Your Honor, we objected seasonably
20 to the Pettit statements in our motion in limine. That
21 was denied. This witness testified on direct that he
22 had a conversation with David Pettit, and he is relying
23 on that for his opinion. The only basis for him to do
24 so would be under Rule 703, which provides in pertinent
25 part, "Bases of Opinion Testimony by Experts. If of a

1 type reasonably relied upon by experts in the
2 particular field in forming opinions or inferences upon
3 the subject, the facts or data need not be admissible
4 in evidence in order for the opinion or inference to be
5 admitted."

6 Presumably, Your Honor, that's the basis for
7 this witness relying on all these business documents
8 which are all hearsay as to this witness, but also this
9 Pettit conversation, which was an ex parte
10 conversation, and Upsher-Smith and its counsel, not to
11 mention Schering-Plough, of course, were not party to
12 that conversation.

13 We have a sworn statement here, Your Honor,
14 which facially has higher indicia of reliability than
15 this witness' recount on the witness stand of the
16 statements of an extrajudicial declarant.

17 MR. KADES: Your Honor, I think we've made our
18 point, and -- you understand our position.

19 JUDGE CHAPPELL: Mr. Nields, did you have
20 something to say?

21 MR. NIELDS: Simply, Your Honor, that it would
22 seem to us that this is absolutely proper impeachment
23 of Professor Bresnahan's opinion and of the
24 out-of-court, unsworn statement on which he relies,
25 classic impeachment we would say.

1 JUDGE CHAPPELL: The problem we have with
2 Federal Rule 703 is it opens a can of worms and leads
3 us into a spiral that never ends. We're going back and
4 forth, back and forth about what was relied upon,
5 whether it's credible or not, and I don't recall
6 exactly what the witness said. So, I want you to lay a
7 foundation.

8 If he said that he based his opinion merely on
9 a conversation with this witness -- and I don't
10 recall, it's in the record -- then I don't hear any
11 objection that this is not reliable, and accordingly,
12 I'm going to allow you to cross examine the expert.
13 I'm not admitting this as substantive evidence. This
14 is not going to be part of the record to support a
15 decision in this case.

16 So, I'm going to allow you to go into cross
17 exam on the limited basis of testing the credibility --
18 in other words, impeaching -- his assertion about his
19 phone call with this witness.

20 MR. GIDLEY: Very good, Your Honor.

21 JUDGE CHAPPELL: And on that basis, I'm
22 overruling the Government's objection.

23 BY MR. GIDLEY:

24 Q. Professor Bresnahan, you testified on direct
25 that you had a conversation with Mr. David Pettit, and

1 in that conversation, Mr. Pettit had indicated that
2 with respect to Niacor-SR and his efforts in Europe
3 that it was unlikely that an unconditional or --
4 payment, noncontingent payment would have been made to
5 Upsher-Smith. Isn't that the case?

6 A. A large unconditional payment would have been
7 made, yes.

8 Q. And directing your attention to the exhibit
9 that's been marked 1023, Mr. David Pettit swears as
10 follows:

11 "Further, I cannot accept the statement of --
12 that Professor Bresnahan attributes to me that I made a
13 'detailed analysis' of the situation regarding the
14 value of any potential license arrangements by
15 Upsher-Smith," reading from paragraph 19, Professor.

16 A. I'm sorry, where am I?

17 Q. The first sentence of paragraph 19. "My files
18 do not indicate --" I'll be happy to repeat it.

19 "Further, I cannot accept the statement that
20 Professor Bresnahan attributes to me that I made a
21 'detailed analysis' of the situation regarding the
22 value of any potential license arrangements by
23 Upsher-Smith. My files do not indicate that I
24 discussed this in detail with Upsher-Smith at any time.
25 My comments to Professor Bresnahan were made on the

1 basis that the telephone conversation had been
2 described to me - to deal with 'generalities' and not
3 'specifics.'" .

4 Do you see that quote?

5 A. I do.

6 Q. And was that, in fact, not the case, that the
7 conversation was designed to elicit from Mr. David
8 Pettit a general discussion of European licensing and
9 not a specific discussion of the Niacor-SR license?

10 A. I don't know about the design. I asked him
11 about both of those things.

12 Q. Is it your sworn testimony, sir, that you asked
13 Mr. David Pettit about the actual state of negotiations
14 in Europe in June of 1997 and the possibility for a
15 noncontingent payment by Upsher-Smith -- to
16 Upsher-Smith in connection with Niacor-SR?

17 A. Yes.

18 Q. Directing your attention to paragraph 20, Mr.
19 David Pettit further avers, "The value of a license
20 agreement can be considered as 'unique' to each company
21 - it depends on what they want to license; the markets
22 that they may wish to enter or to serve; how it fits in
23 with a marketed products portfolio or an R&D portfolio,
24 etc., etc."

25 Did that come up in your discussion?

1 A. Yes, Mr. Pettit both said that the value of the
2 license agreement varies with product and
3 circumstances. My discussions were about not the total
4 value but the form particularly with regard to up-front
5 payments.

6 Q. Professor Bresnahan, he further avers, "In
7 addition, there is nothing in my --" this is paragraph
8 21.

9 "In addition, there is nothing in my records to
10 indicate that I considered in any depth the level or
11 timing of 'up-front' or 'milestone' payments as these
12 vary, as indicated above and in my experience,
13 according to the often unique circumstances of each
14 case and in very few instances are they the same."

15 Paragraph 22: "Having been advised by
16 Professor Bresnahan at the end of the telephone
17 conversation that I had been very helpful in providing
18 background information on licensing matters in Europe,
19 I can only express my deep concern that any comments
20 that I may have made may have been taken out of context
21 especially when at no time before, during or after the
22 telephone conversation was I informed that this was an
23 interview nor was I informed as to the use to which the
24 information I provided would be put."

25 A. I don't know what he means when he says it was

1 not an interview. I don't -- I don't know if I used
2 the word "interview," but the -- I definitely told him
3 that this was part of my preparation to appear as a
4 witness in this trial.

5 Q. You testified earlier that Ms. Vicki O'Neill
6 testified under oath in her deposition that Pierre
7 Fabre was only operating in three countries, did you
8 not?

9 A. No, no, no, that she -- that she had mentioned
10 the possibility of noncontingent payments for three
11 countries.

12 Q. Isn't it the case that she talked about
13 noncontingent payments being made in as many as nine
14 countries, sir?

15 A. I don't recall that.

16 Q. Let me direct --

17 JUDGE CHAPPELL: Mr. Gidley, do you have the
18 original of the affidavit from England marked as an
19 exhibit for identification with your next -- whatever
20 your next number is?

21 MR. GIDLEY: Yes, Your Honor, we will do that.

22 JUDGE CHAPPELL: Thank you.

23 MR. GIDLEY: We will make that Exhibit 1024,
24 the original.

25 JUDGE CHAPPELL: And it's being marked for

1 identification, not admitted into evidence.

2 MR. GIDLEY: Very good, Your Honor. We may
3 have to supply that tomorrow morning.

4 (USX Exhibit Number 1024 was marked for
5 identification.)

6 BY MR. GIDLEY:

7 Q. Sir, directing your attention to the deposition
8 of Ms. Vicki O'Neill, at transcript pages 69 to 70:

9 "QUESTION: Which countries would Pierre Fabre
10 have the ability to market Niacor-SR?

11 "ANSWER: I don't know if I'm qualified to say
12 what countries they had the ability to market
13 Niacor-SR. I could recall from their presentation what
14 countries they were currently marketing products in.

15 "QUESTION: What countries were they currently
16 marketing products? This is in June of 1997?

17 "ANSWER: June of 1997, I believe in my recall
18 of the presentation there was approximately nine
19 countries where they were marketing products. These
20 countries included Spain, France, Greece, Germany,
21 Japan, actually. A total of nine which would be the
22 best to see what their presentation had. But I
23 remember there being nine countries. I think they were
24 also in Mexico."

25 Do you see that testimony, sir?

1 A. I do.

2 Q. Let me direct your attention now, Professor
3 Bresnahan, back to your report. You made reference to
4 one of the most infamous price-fixing scandals in our
5 country's history, the so-called "Phases of the Moon"
6 scandal. Do you recall doing that, sir?

7 A. I do.

8 Q. And is that a reference which, given the
9 passage of several months, you've come to regret making
10 in the context of this case?

11 A. No.

12 Q. Let's go through what happened in the Phases of
13 the Moon conspiracy and see if there are any parallels
14 to this case.

15 Now, the Phases of the Moon conspiracy as
16 related by ^ John M. Blair in his book Economic
17 Concentration: Structure and Behavior of Public
18 Policy, at page 578, describes the Phases of the Moon
19 price-fixing conspiracy in the following way:

20 "The price --"

21 MR. KADES: Objection, Your Honor. I think
22 he's about to read hearsay for the record.

23 MR. GIDLEY: I'm asking the witness whether or
24 not what happened in the Phases of the Moon
25 price-fixing collusion conspiracy has even the remotest

1 connection to this case.

2 MR. KADES: Your Honor, then let him ask the
3 witness that question. This book has not been
4 established as a learned treatise, and he's just
5 reading it into the record.

6 JUDGE CHAPPELL: Objection sustained. There's
7 no foundation for you to read the treatise.

8 BY MR. GIDLEY:

9 Q. Professor, are you familiar with the Phases of
10 the Moon conspiracy that you refer to in your report in
11 this case?

12 A. I am.

13 Q. Was there not furtive conduct that was known by
14 the corporate executives in that case that was
15 indication -- indicative of the fact that they knew
16 what they were doing was wrong?

17 A. I believe that's correct.

18 Q. For instance, weren't there telephone calls
19 made to the business people's homes rather than work?

20 A. I don't recall the telephone calls to the homes
21 rather than work.

22 Q. Wasn't it also the case that they met at hotels
23 and did not keep records of the meetings? Isn't that
24 the case in the Phases of the Moon conspiracy?

25 A. I don't recall that either.

1 Q. Isn't it the case, sir, in Phases of the Moon
2 that they destroyed written communications shortly
3 after receipt?

4 A. I don't recall that either.

5 Q. Did any of those things happen in this case,
6 sir?

7 A. Not to my knowledge.

8 Q. You have no knowledge, sir, that there have
9 been any documents destroyed in this case. Isn't that
10 correct?

11 A. That is absolutely right.

12 Q. And far from there being furtive conduct, the
13 agreement in this case was presented to the full board
14 of the Schering-Plough Corporation, was it not?

15 A. That's right.

16 Q. And indeed, counsel on both sides reviewed the
17 agreement, sir. Isn't that the case?

18 A. That's my understanding.

19 Q. And it was a written agreement that was in the
20 company files of both companies seen obviously by the
21 highest executives of each company?

22 A. I guess that's right, yes.

23 Q. Is there the remotest connection with the
24 furtive conduct in the Phases of the Moon conspiracy to
25 this case, sir?

1 A. No, not with the furtive conduct.

2 Q. Thank you.

3 I have no further questions of this witness at
4 this time.

5 JUDGE CHAPPELL: Who will be handling the cross
6 for Schering?

7 MR. NIELDS: I will, Your Honor.

8 JUDGE CHAPPELL: I'm assuming you're going to
9 have more than seven minutes. Is that right, Mr.
10 Nields?

11 MR. NIELDS: That is a safe assumption, Your
12 Honor.

13 JUDGE CHAPPELL: Okay. With that, why don't we
14 call it a day, and tomorrow we're going to start at
15 11:30. So, we're going to recess until tomorrow
16 morning at 11:30. Thank you.

17 MR. NIELDS: Thank you, Your Honor.

18 MR. GIDLEY: Thank you, Your Honor.

19 JUDGE CHAPPELL: We're off the record.

20 (Whereupon, at 5:22 p.m., the hearing was
21 adjourned.)

22

23

24

25

1 C E R T I F I C A T I O N O F R E P O R T E R

2 DOCKET/FILE NUMBER: 9297

3 CASE TITLE: SCHERING-PLOUGH/UPSHER-SMITH

4 DATE: JANUARY 29, 2002

5

6 I HEREBY CERTIFY that the transcript contained
7 herein is a full and accurate transcript of the notes
8 taken by me at the hearing on the above cause before
9 the FEDERAL TRADE COMMISSION to the best of my
10 knowledge and belief.

11

12 DATED: 1/30/02

13

14

15

16 SUSANNE BERGLING, RMR

17

18 C E R T I F I C A T I O N O F P R O O F R E A D E R

19

20 I HEREBY CERTIFY that I proofread the
21 transcript for accuracy in spelling, hyphenation,
22 punctuation and format.

23

24

25 DIANE QUADE

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Waldorf, Maryland
(301) 870-8025